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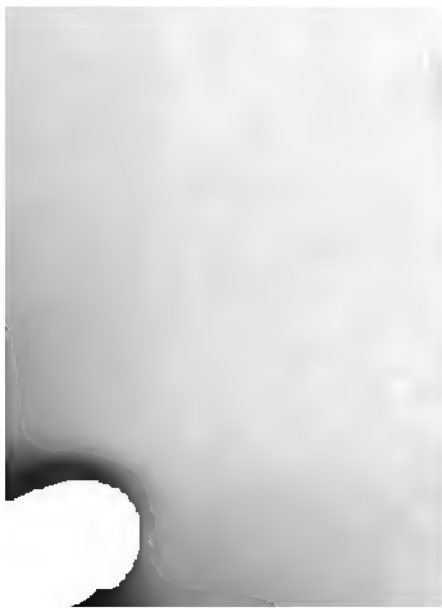
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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT, COURT OF CHANCERY,
AND VICE ADMIRALTY COURT

OF

PRINCE EDWARD ISLAND.

WITH

A TABLE OF THE NAMES OF THE CASES REPORTED,
A TABLE OF THE NAMES OF THE CASES CITED,
AND A DIGEST.

VOL. I.

1850 – 1874, INCLUSIVE.

By

FRANCIS L. HASZARD, AND
A. BANNERMAN WARBURTON, } BARRISTERS-AT-LAW.

PRINTED AND PUBLISHED BY JOHN COOMBS,

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1885.



JUDGES
OF THE
SUPREME COURT OF P. E. ISLAND,
FROM A. D. 1770 TO A. D. 1874, INCLUSIVE.

WITH THE DATES OF THEIR APPOINTMENTS.

CHIEF JUSTICES.

JOHN DUPORT, 19th September, 1770.
PETER STEWART, 23rd June, 1776.
THOMAS COCHRANE, 24th October, 1801.
ROBERT THORPE, 10th November, 1802.
CAESAR COLOLOUGH, 1st May, 1807.
THOMAS TREMLETT, 6th April, 1813.
S. G. W. ARCHIBALD, 7th August, 1824.
E. J. JARVIS, 30th August, 1828.
SIR ROBERT HODGSON, Knt., 2nd April, 1853.
EDWARD PALMER, 7th July, 1874.

ASSISTANT JUDGES.

THOMAS WRIGHT, ROBERT GREY.
JOSEPH ROBINSON, JAMES CURTIS.
THOMAS H. HAVILAND, AMBROSE LANE.
GEORGE WRIGHT, JOHN BARROW.
JAMES HORSFIELD PETERS, 29th September, 1848.
JOSEPH HENSLEY, October, 1869.

ATTORNEYS GENERAL

FROM A. D. 1770 TO A. D. 1874, INCLUSIVE.

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JOSEPH APLIN.		
JOHN WENTWORTH,	.	1780.
PETER MACGOWAN,	.	1800.
CHARLES STEWART,	.	1811.
WM. JOHNSTONE,	.	1813.
ROBERT HODGSON,	.	1829.
CHARLES YOUNG,	.	1851.
JOSEPH HENSLEY,	.	1853.
CHARLES YOUNG,	.	1858.
FREDERICK BRECKEN,	.	1859.
EDWARD PALMER,	.	1863.
JOSEPH HENSLEY,	.	1867.
FREDERICK BRECKEN,	.	1870.
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ERRATA.—After JOSEPH HENSLEY, 1867, read

D. O'M. REDDIN,	.	1869.
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CASES

DETERMINED BY THE

SUPREME COURT, COURT OF CHANCERY, AND
VICE ADMIRALTY COURT

OF

PRINCE EDWARD ISLAND.

IN AND AFTER HILARY TERM, 1850.

JOHN BELL CORMACK v. CHARLES WORRELL AN AB. DR.

*P. E. I. Absent Debtor Act, 20 Geo. III, Cap. 9—Attachment—
Agent not summoned may defend first trial without waiving
principal's right to rehearing—New Trial.*

An Absent Debtor Attachment under 20, Geo. III, Cap 9, was issued against W. but no summons was served on his Agent. The 8th sect. of the Statute gives the Absent Debtor the right to a rehearing within three years after Judgment. At trial of this cause, the defendant's agent, by his Counsel wished to cross-examine the witnesses and address the Jury. It was objected that he could not do so without waiving defendant's right to a rehearing and that as no appearance had been entered by the agent for the defendant, the agent could not be heard to defend. The Court at the trial refused to allow the agent's Counsel to proceed, but reserved the point.

Held, (Peters J.) that the agent had the right to defend without waiving his principal's right to a rehearing.

RULE nisi for a new trial on the ground of improper rejection of evidence.

5th November, 1849.

The Solicitor General, for plaintiff shows cause against the rule.

Mr. Lawson, for defendant in support of the rule.

2nd January, 1850.

PETERS J. This action was commenced under the 20 Geo. 3, Cap. 9, by attachment against the property of the

defendant late an inhabitant of this Island, without summons on the agent. At the trial, the agent of the defendant, by his Counsel, wished to cross examine the witnesses and address the Jury. It was objected that he could not do so without waiving the defendant's right to a rehearing under the 8th section and that as no appearance had been entered by the agent for the defendant, the agent could not be heard to defend. My opinion at the trial was that the agent had a right to make the defence he desired, but as the point was new I refused to allow his Counsel to proceed and reserved the point.

The statute gives extraordinary powers by allowing a suit to be tried and a person to be condemned in any amount without notice of the suit against him. Now, however necessary this departure from the ordinary rule (that no one shall have judgment against him without notice to answer the suit) may be, and it is, no doubt, very necessary, it is plain that unless it were coupled with provisions widely different from those which regulate the practice in ordinary suits, it would render the property and assets of absent persons insecure and furnish the unscrupulous and dishonest with facilities for making the Courts of Justice instrumental in the commission of fraud. To guard against this the statute provides, "That a declaration shall be left at the defendant's last place of abode fourteen days before the sitting of the Court; and that his attorney, factor, agent, or trustee, shall, if he desire, be admitted to defend the suit on behalf of his principal throughout the course of the law, and an imparlance shall be granted two terms successively that he may have an opportunity to notify his principal and at the third term without special matter alleged in bar, abatement or continuance, the cause shall peremptorily come to trial." Now though a person may be the general agent of an absent debtor he may not be conversant with all, or any of the transactions out of which a suit may arise, and claims not founded in justice would be those with the

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circumstances of which he is least likely to be acquainted. Suppose an account rendered to the principal containing gross over charges had been settled by payment of a smaller sum, he would not suppose it would be again called in question, and would therefore not probably on his departure inform his agent of the fact. If this account were sued for under the act, to make a *successful* defence the agent would require instructions, but his principal may be in some distant country, or he may not know where he is, and cannot therefore obtain the information before the trial. Is the agent therefore to be silent and allow a verdict to be obtained for perhaps £200, when if his counsel were allowed to cross examine, and the value of the articles in the account and other circumstances to be inquired into, he might at once without any instructions from his principal reduce it perhaps to £100, or if he ventures to do so must he deprive his principal of a rehearing under the 8th section, and thereby fix him with the £100, when in fact nothing was due? Again the three years allowed by the 8th section may expire before the principal returns or is heard from, or in fact before he knows that he is sued. And then if the agent, induced to silence through fear of waiving his principal's right to a rehearing makes no defence, his principal is fixed with the £200, when even the half defence of his uninstructed agent would have reduced it to £100; I cannot think such a construction would be in accordance with the spirit and intention of the act.

The act recognizes the necessity which may exist of the agent's communicating with his principal and gives a very limited time for that purpose. It then speaks of a trial to be had in the defendant's absence, and on which trial the agent may or may not have received instructions from his principal. A trial necessarily supposes the probability of something more than a mere hearing on one side only, and the provision allowing the agent to defend the suit if he desire, and giving a certain time to communicate with

his principal, and then ordering the trial peremptorily to take place at the third term, shews the Legislature to have contemplated the agent's taking part in it whether he received instructions or not. If not, why in case of non-appearance did it not allow the plaintiff to take judgment by default? Why should it require the intervention of a Jury not to assess damages but to try the cause? And then the 8th section (*without excepting cases* where the *agent* may have appeared at the first trial, or confining it to a mere *ex parte* trial) enacts that the "absent person against whom judgment shall be recovered as aforesaid shall be entitled to a rehearing within three years." These provisions appear to me irreconcilable with the idea that the agent must be a mere silent spectator at the first trial, or if he attempts to cut down the plaintiff's demand, concludes his principal by the result.

It was urged (on the principle *qui facit per alium facit per se*) that the appearance of the agent cured the abscondency, but the fallacy of this argument lies in *assuming* that the appearance of the agent must be the appearance of the principal. To make the appearance his act, he must have authorized it to be entered. It by no means follows that the agent left in charge of property has authority to defend suits brought against the owner *for debts*, yet his duty would be to protect it as far as he could from attachments or other claims, with the validity of which he is unacquainted. Before therefore the maxim *qui facit per alium facit per se* would apply it must appear that he was authorized to defend *that particular* suit, and then the appearance would in fact be the appearance of the principal and might deprive him of his right to a rehearing under the 8th section. But how can a person be *presumed* to have given authority to defend a particular suit when, for anything that appears, he may never have had notice of the plaintiff's intention to bring a suit against him? Besides the 2nd section in express

words speaks of a judgment to be recovered *in a trial to be defended by the agent*, and then the 8th section in equally express terms enacts that in the cases mentioned in the 2nd section in which judgment is recovered as therein mentioned, the defendant shall be entitled to a rehearing. A provision which is quite inconsistent with an intention to make the appearance of the agent tantamount to the appearance of the principal, or in other words, cure the abscondency. The defence of the agent in cases of this kind is in truth his own act, to protect the assets committed to his care and not the act of the absent party at all, and the novelty of allowing a person not a party on the record to defend is a necessary consequence of the novel manner in which the plaintiff is allowed to prosecute his suit.

It was insisted on by the plaintiff's Counsel that unless notice was given of the agent's intention to appear at the trial the plaintiff would be taken by surprise, but I cannot see the force of this argument. In every suit where the general issue only is pleaded the plaintiff might make the same objection. The only intimation the defendant gives of his ground of defence in those cases being, I don't owe anything, which is precisely what the defendant (or rather the Court) in an absent debtor case says for him. The general issue in those cases is in fact put on the record, and the Jury are sworn to try it, and any defence which the defendant himself could make under it can, I think be made by the agent unless (as in case of set off) the law requires a notice of it to be given to the plaintiff, in which case the agent would have to give it in the same way as the defendant must have done.

An inference was attempted to be drawn by the Solicitor General from the 4th section to shew that the agent *must* come in at the first term, but that section applies to cases where the plaintiff *not only* asserts his claim against the absent debtor, but also puts himself as it were in the shoes of the absent party, and attempts to

call his agent to account for the assets of his principal in his hands. That is a very different case from the present. There the agent himself may become the defendant, and say I owe the absent party nothing, and an issue may thus be raised between the agent and the plaintiff entirely collateral to the principal's suit. Besides the section applies only to costs, which appear to be given *in terrorem* against the garnishee if he does not appear at the first term, to prevent his delaying the discovery which the plaintiff seeks from him, and which it may be material he should have in the first instance, in order that he may see whether the assets of the absent debtor will furnish the fruits of the judgment in the principal suit. A circumstance which may materially influence him in its further prosecution.

Upon the whole it appears to me that the plaintiff can sustain no injury from the agent's being allowed to contest the first trial, but that the greatest injustice may result from his being excluded, a circumstance which if the intention of the statute had been doubtful (which I do not think it is) would have caused me to ponder well before arriving at the contrary conclusion.

The American cases which were cited at the bar were determined on acts having provisions different from our Statute, and if it had been otherwise I should not consider myself bound by them in opposition to what I conceive to be the clear intention of the act.

The rule for a new trial must be absolute.

JAMES HOWATT V. GEORGE LAIRD AND BENJAMIN CREW.

*Damming natural water course—Rights of riparian owner—
Injury to or invasion of rights of owners below—Action
lies though no actual damage sustained.*

H. had erected a mill in 1815, and about ten years before this action, L. built a mill higher up on the same stream. The natural flow of water at many seasons of the year would not keep up a head of water sufficient to drive the mills, and the defendant was in the daily habit of shutting the gates of his dam and stopping the water for considerable portions of time, when it was prevented from flowing to plaintiff's mill, who showed a continued interruption of the natural flow of the stream. At the trial the Judge told the Jury that the running water of a natural stream was public property which no one had a right to interrupt or detain, that though slight detentions without actual damage might not be actionable yet substantial and continuous interruptions were so, even without actual damage to parties below, because if suffered for 20 years the right to continue them would be acquired, and that if they found defendant had been in the habit of detaining the water whereby its flow to plaintiff's mill was interrupted, the plaintiff would be entitled to nominal damages for the injury to his right.

The Jury found for plaintiff, damages one shilling, the effect of which finding was that defendant has caused substantial interruption of the *natural* flow of the water, but that plaintiff had sustained no *actual* loss thereby.

A new trial was moved for, for misdirection, on the grounds (1) That every riparian owner has a right to erect a dam, and daily to detain the water, for such spaces of time as may be necessary to fill a dam of such size as is reasonably sufficient to drive his mill. (2) That this was at most a mere injury to a right without any actual damage, for which no action lies.

Held, (Peters J.) that an action would lie without actual damage and that the rule for a new trial must be discharged.

THIS cause was tried on 2nd January, 1850, and on the 12th January, 1850, a rule nisi for a new trial on the grounds stated in the judgment was granted.

19th January, 1850.

The Solicitor General for plaintiff showed cause.

Mr. Lawson (with him Mr. Charles Palmer) for defendant in support of the rule.

Easter Term, 1850.

PETERS J. This was an action for interrupting a natural water course. It appeared that the plaintiff's mill was erected in 1815, and that about ten years since the defendant had erected a mill higher up on the same stream. The evidence on both sides went to prove that at many seasons of the year the natural flow of the stream would not keep up a head of water sufficient to drive the mills, and that the defendant was in the daily habit of shutting the gates of his dam and stopping the water for considerable portions of time (chiefly during the night) whereby during those times it was prevented from flowing to the plaintiff's mill. The plaintiff contended that he had sustained actual damage by being prevented from grinding corn, which but for such interruption of the water he would have done, (but on this point the evidence was contradictory,) and that even though he had suffered no pecuniary loss, yet as he had shewn a material and continued interruption of the natural flow of the stream, there was an injury to his right and therefore he was entitled to a verdict.

I told the Jury that the running water of a natural stream was public property, and that no one had a right to interrupt or detain it, that though slight or temporary detentions might not be actionable unless actual damage was sustained, yet that substantial and continuous interruptions of the natural flow of the stream were so, whether actual damage was sustained by those below or not, because if they were suffered, at the end of twenty years the party making them would acquire a right to continue them, and that in the present case, if they found that defendant had been in the habit of detaining the water either by night or day, for considerable portions of time, whereby its flow to the plaintiff's mill was interrupted, the plaintiff would be entitled to recover nominal damages for the injury to his right, and that if under the evidence they thought the plaintiff had sustained actual loss in consequence of such detention

they should give such amount as would compensate the loss.

The Jury found for the plaintiff, damages one shilling. The effect of this verdict is, that the Jury find that the defendant has caused substantial interruption of the *natural* flow of the water, but that the plaintiff has sustained no *actual* loss thereby.

A new trial is now moved for, for misdirection, and the grounds relied on by the defendant's counsel are :—

First,—that every riparian owner has a right to erect a dam, and daily to detain the water for such spaces of time as may be necessary to fill a dam of such size as is reasonably sufficient to drive his mill.

Secondly,—that this is at most a mere injury to a right without any actual damage for which no action lies.

In support of the first proposition the learned Counsel for the defendant relies on the doctrine laid down by Chancellor Kent (1.) who says that “streams of water are intended for the use and comfort of man, and it would be unreasonable, and contrary to the universal sense of mankind to debar every riparian proprietor from the application of the water to domestic, agricultural and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned, and there will no doubt inevitably be in the exercise of a perfect right to the use of water some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex* and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend on the nature and extent of the complaint or injury and the manner of using the water. All that the law requires of a party by or over whose land a stream passes is that he should use the water in a reasonable manner, and so as not to destroy, or render

(1) 3 Com. 440.

useless, or materially *diminish* or *affect the application* of the water by the proprietors above or below on the stream."

But this passage when rightly considered is not an authority for the position relied on for the defence. No doubt as incident to the useful application of water power there must be slight variations in the force and temporary detentions of the stream. It may be necessary to shut the gates for short periods of time, not for the purpose of checking the stream to raise a head, but to carry on the ordinary work of a mill. Short interruptions of this description producing very slight injury to those below may rightly be said to come within the maxim *de minimis non curat lex*. Again, there may be interruptions which will be actionable or not according as they are productive of actual damage or not. Every man has a right to erect a dam across a stream running through his own land, and he must necessarily (even on streams sufficiently powerful for his works) before he can start them, check the water to raise a head, but though he has a right to do this, he must do it so as to cause no serious loss to those below. For instance, suppose a person erects a dam which would flood some miles of ground and therefore require many days to fill it, and that during that time he constantly stops the stream, if the mill owner lower down could shew that he had been prevented from grinding corn, or had suffered material loss in consequence of such detention of the water, he would be entitled to recover, but unless he did he would not, *because* the act complained of would be done by the defendant, not under a *claim of right* to cause daily and frequent interruptions, but only of a temporary kind equally necessary to all mills, (however well adapted to the force of the stream) before starting. So a dam may break and the water be let off to repair it, the letting off the water would cause a temporary increase of current, and when repaired another detention would be necessary to refill it, but if the

increased velocity or temporary detention caused no *actual* injury to those below, it would not be actionable because they would sustain no damage in fact, nor (as the character of the act would not be such as to gain a right frequently to accelerate, or constantly to interrupt the stream) could there be any damage to the *right*.

This distinction as to the purpose with which an act is done was recognized in *Greenslade v. Halladay* (1). There the defendant had been in the habit of placing a board or fender across a stream to turn the water, but it had not been permanently fixed. The plaintiff's tenant fastened the board with stakes. The defendant conceiving that the stakes gave a character of permanency to the board, removed both board and stakes, and although plaintiff recovered on the ground that the defendant had no right to remove the board, yet the opinion of the Court seems to have been that if he had removed the stakes only he would have been justified. So in *Greaves v. Burbury coram Bailey* at York assizes the plaintiff had used the water for his cattle and the defendant diverted it under an assertion of right and of his intention that the diversion should be permanent. It was held that the plaintiff was entitled to recover damages, although the stoppage was in fact but temporary, for if no action was brought a stoppage with an assertion of right would afterwards be evidence of right.

It is to temporary interruptions of such description which do not, and cannot materially diminish or affect the application of the water by the proprietors below to the various purposes to which it may be applied, that I understand Chancellor Kent to refer.

But the question assumes a very different aspect when the defendant claims a right daily to cause an almost total stoppage of the stream for considerable portions of time in order that he may raise a head of water necessary to

(1) 6 Bing. 381.

drive his works. This appears to me an interference with the rights of those below not consistent with the principles laid down in some (even of the American) cases, which seem to be considered of the highest authority in that country.

In *Tyler v. Wilkinson* (1) Justice Story says, "I do not mean to be understood as holding the doctrine that there can be no *detention* whatever, or no obstruction or impediment whatever, by a riparian proprietor in the use of the water as it flows, for that would be to deny all valuable use. The true test of the principle and extent of the use is whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or a retardation or acceleration of the natural current indispensable for the general use of the water, perfectly consistent with the use of the *common right*. The diminution, retardation or acceleration, not permanently and sensibly injurious by diminishing the value of the common right, is an implied element in the right of using the stream at all."

In *Sackrider v. Beers*, (2) the court says, "The defendant has no doubt a right to build a mill on his own land, but he must so construct the dam, and so use the water as not to injure his neighbors below in the enjoyment of the same right *according to its natural course*." The principle of the American Law appears from these cases to be that although the owner above may cause slight interruptions, accelerations and detentions, yet if they be such as sensibly to diminish *any one* of the advantages which it would naturally afford the owner below, it will be an injury to the right. There are many American cases which go much further, some not reconcilable with each other and some permitting interruptions which might destroy the use of streams for manufacturing purposes altogether. Thus in *Perkins v. Dow* (3) decided

(1) *Masons Rep.* 397 at p. 401. (2) *10 Johns. Rep.* 241.

(3) *1 Root (Conn.)* 535.

in Connecticut, it appears to have been held that a riparian proprietor may use the whole of the stream to irrigate his meadows, provided he leave sufficient to the proprietor below for kitchen purposes, and for watering his cattle. But if this be law in that country, it is a doctrine unknown to the law of England by which in this respect we are bound.

A feeble stream may be quite sufficient to drive a small mill without material detention of the water, but if a person chooses on such a stream to erect a mill, which at many seasons of the year he cannot work without stopping the water for considerable portions of each day, such stoppage must be a permanent and sensible injury to the right of those below, because even if they have mills of the same description, (viz: requiring more power than the stream would constantly afford), it would restrict their working in a great measure to such times as the miller higher up chose to let off the water. But there are other works to which those below may apply the water. The carding mill, the trip hammer of the engineer, the turning lathe of the mechanic, the loom of the weaver, the threshing machine and chaff-cutter of the agriculturist, and various other kinds of machinery, just as important to their respective owners as the saw or grist mill to theirs, might (when a head of water was once raised) be at all times driven by a stream quite insufficient to keep a saw or grist mill constantly at work. The owners of such works would have a right to keep them at work during the whole twenty-four hours. Can the owner of works higher up, by the common law of England, require that right to be sacrificed or abridged for his benefit? If he can, then those lower down must be constantly subject to have the value of their property materially diminished, since the value of their participation in the common right would then depend not on the natural force of the stream, but on the power which the upper works from their construction may require from it.

That the value of the water privilege does not by the law of England rest on such uncertain and fluctuating grounds, appears plain from some decided cases.

In *Shears v. Wood* (1) it appeared that the plaintiffs were owners of copper mills, and the defendant of a silk mill higher up on the same stream, that the latter caused a dam to be erected which prevented the water from being supplied to the lower mills, but that the stream was not diverted in consequence, as the water returned to its regular course long before it reached the lower mills, and that no waste of it whatever was occasioned by the dam in question. It was proved that the plaintiffs had sustained an injury by the erection of the dam, as in the manufacture of copper a regular supply of water was always necessary. It was objected by the defendant that the injury done to the plaintiffs by the erection of the dam was misdescribed in the declaration, as the regular supply of water was not diverted, but interrupted. The Court overruled the objection, saying, "that it was in fact stated in the declaration that the water did not run to the plaintiffs' mills as they were accustomed to have it. That is sufficient to show that it did not come to them in its proper and its usual times, or as it ought to have done, and it was proved that it did not come to their mills in a sufficient quantity as it formerly used to do, that fact was sufficient to support the declaration."

In *Howard v. Wright* (2) the Master of the Rolls says, "The right to the use of water rests on clear and settled principles; every proprietor has an equal right to use the water which flows in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor who may be affected by his operations. No proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back on the

(1) 7 Moore 345. (2) 1 Sim. and Stu. 190.

proprietors above. Every proprietor who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must in order to maintain his claim either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years," and he adds, "an action will lie at any time within twenty years, when injury happens to arise, in consequence of a new purpose of the party to avail himself of his common right."

In *Bealey v. Shaw* (1) Lord Ellenborough says, "the rule of law as applied to this subject is, that independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water in his own land without diminution or *alteration*."

In *Mason v. Hill*, (2) where it was contended that prior occupancy by the defendant, (which here is in fact with the plaintiff,) gave the defendant a right which it was admitted he would not otherwise possess. Lord Tenterden decides the case on the authority of *Howard v. Wright* (3).

And in the same case (4) Lord Denman, after an elaborate review of the authorities (and particularly referring to the rule laid down by Lord Ellenborough in *Bealey v. Shaw*, (1) "that every man has a right to have the advantage of a flow of water in his own land without *diminution* or *alteration*") says, "none of these *dicta*, when properly understood with reference to the cases in which they were cited, and the original authorities in the Roman law, from which the position that water is *publici juris* is deduced, ought to be considered as authorities that the first occupier, or first person who chooses to appropriate a natural stream to a useful purpose has a title against the owner of land below, and may deprive him of the benefit of the natural flow of the water."

(1) 6 East 208 at p. 214. (3) 1 Sim. and Stu. 190,

(2) 3 B. and Ad. 304. (4) 5 B. and Ad. 1 at p. 23.

But the case having the most direct bearing on the precise questions before the Court is a very recent one not referred to on the argument, *Wood v. Waugh* (1). There a special verdict amongst other facts found that the defendant caused a diminution of the water of only five per cent. Chief Baron Pollock, in delivering the judgment of the Court, expresses himself as follows: "The defendants contend that the diminution of the water by five per cent. and the altering the flow of the water are injuries too trifling to be the subject of an action." In considering this question it is assumed that the plaintiff's right is established to the use of this water. It is said the true rule on this subject is laid down in 3 Kent's Com. 439, 440, and after quoting the passage (to which I have already referred) he says, "In America a very liberal use of the water for the purpose in question and for carrying on manufactures has been allowed. In France also the right of the riparian proprietor to the use of the water is not strictly construed. He may use it *En bon pere de famille a son plus grand avantage*. He may make trenches to conduct the water to irrigate his land if he return it with no other loss than that which irrigation causes. In England it is not very clear that such a user would be permitted, as arising out of the right to use the water *jure naturae*, but no doubt, if the stream were only used by the riparian proprietor and his family by drinking it and for the supply of domestic purposes, no action would lie for this ordinary use of it, and it may be conceived that if a field be covered with houses, the ordinary use by the inhabitants might sensibly diminish the stream, yet no action would, we apprehend, lie any more than if the air was rendered less pure and healthy by the increase of inhabitants in the neighborhood, and by the smoke issuing from the chimneys of an increased number of houses. But on the other hand as the establishment of a manufactory rendering the air sensibly impure by emitting

(1) 13 Jur. 742. S. C. 3 Ex. 748. 18 L. J. (Ex.) 305.

noxious gases would be actionable, so would it be if it rendered the water less pure by the admixture of noxious substances. And if a mode of enjoyment quite different from the ordinary one is adopted by which the water is diverted into a common reservoir and there delayed for the purpose of a manufacture, an action seems to us to be maintainable, and so if by that mode of dealing with the water it is sensibly diminished in quantity."

From these authorities it seems clear that any frequently recurring detention of the water of a stream by those above which causes a sensible alteration in its natural flow, is considered in law an injury to the right of those below. The defendant here having caused such a detention, not for a temporary purpose but under a claim of right constantly to do so, has I think injured the plaintiff's right.

But then it is urged in the second place that as the plaintiff has not shown actual damage it is *injuria sine damno*, for which it is urged no action lies. And for this the case of *Williams v. Morland*, (1) is relied on. In that case the plaintiff complained that the defendant by certain erections across a stream caused the water to flow with increased velocity and thereby injured his bank. The Jury found that it had not injured his bank and therefore the Court held he could not recover, and Lord Denman in *Mason v. Hill*, (2) after explaining the observations of Bayley Justice states it to be a decision on this ground and nothing more.

In actions for obstructing ways and surcharging commons, it is sufficient to prove that the means of using the right are abridged without showing actual damage, and I can see no reason why a different rule should prevail in cases of this description. A person may have a valuable mill privilege on his property, but want of capital or other circumstances may prevent his

(1) 2 B. and C. 910.

(2) 5 B. and Ad. 1.

turning it immediately to profitable use. If he cannot bring an action for interruption of the water before he has done so, then he must either make a considerable outlay merely to place him in a position to protect his right, or else he must after twenty years lose it altogether. This point was alluded to by Lord Tenterden in *Mason v. Hill* (1). After observing that it seemed to have been considered that an action would not lie without actual loss, he says, "It is not necessary to say whether such a principle should be admitted." The same point (though not necessary to be decided) was subsequently considered by the Court in the same case, and Lord Denman after referring to the cases of *Palmer v. Keblethwaite* (2) and *Glynne v. Nicholas*, (3) says, "It must not therefore be considered as clear that an occupier of land may recover for the loss of the general benefit of the water without a special use or special damage shown.

In *Gardiner v. Trustees of Newbury*, (4) Chancellor Kent, in granting an injunction against diverting a water course says, "It must be painful to any one to be deprived at once of the enjoyment of a stream which he has been accustomed always to see flowing by the door of his dwelling." Upon which Mr. Angell in his treatise observes, that "it is fairly to be inferred from his opinion in this case that he considered the right to the water in its natural state to be a freehold right that could not be invaded whether the water were actually used by the party or not. And the same author after reviewing the American and English authorities on the infringement of rights of ways, commons, etc., concludes thus: "The rule established by these cases is unquestionably applicable to this subject, and they certainly evince that the owners of the land through which a stream of water passes in its natural course, are under no obligation to prove a specific injury for a diminution

(1) 3 B. and Ad. at p. 312. (3) 2 Show 507.

(2) 1 Show 64.

(4) 2 Johns.(N.Y.) Ch. R. 162.

or detention of the water. That there exists a right and that such right has been invaded is sufficient, and if an action should be delayed until actual damage could be proved, the defendant by repeated invasions might himself acquire a title which could not be successfully opposed.

But the point was expressly decided in *Wood v. Waugh* (1). There the special verdict found the grievance complained of, viz., fouling the water caused no actual damage to the plaintiff. Pollock, C. B., in delivering the Judgment says, "The fact as found by the Jury is that the defendant (whose works have been erected within twenty years and who has no right by long enjoyment or grant to do so) has fouled the water of the natural stream by pouring in soap-suds, wool combings, etc., but that pollution of the natural stream has done no actual damage to the plaintiff, because it was already so polluted by similar acts of mill owners above the defendant's mill, and by dyers still further up the stream, and some sewer of the town of Bradford, that the wrongful act of the defendants made no practical difference; that is, that the pollution by the defendants did not make it less applicable to useful purposes than such water was before. We think, notwithstanding, that the plaintiffs have received damage in point of law. They had a right to the natural stream flowing through the land in its natural state, as an incident to the right to the land on which the water course flowed, as will be hereafter more fully stated; and that right continues, except so far as it may be derogated from by user or by grant to the neighboring owners.

This is a case therefore of an injury to a right. The defendants by continuing the practice for twenty years might establish the right to the easement of discharging into the stream the foul water from their works; and if

(1) 13 Jur. 742.

the dye works and other manufactories, and other sources of pollution above the plaintiffs, should be afterwards discontinued, the plaintiff who would otherwise have had in that case pure water, would be compelled to submit to this nuisance which would then do serious damages to them. We think the verdict must therefore be entered in this Court for the plaintiff."

From these authorities as well as on the principle that if the law recognizes a valuable right the owner of it should have the power of preserving it until he may want to use it, it appears to me clear that for any material diversion, stoppage or alteration of a stream, of a description injurious to the rights of those below, an action will lie though no actual damage may have been sustained.

The questions raised in this case bearing as they do on valuable interests, rendered it one of considerable importance, and I have therefore thought it proper to enter at a greater length than I otherwise would have done, into the examination of the authorities and principles by which rights of this description are governed.

The rule for a new trial must be discharged.

IN CHANCERY,

FEBRUARY, 1851.

JAMES HOWATT, v. GEORGE LAIRD.

Injunction—Riparian owner—Right to natural watercourse not extinguished by unity of possession—Injunction not granted in all cases where a plaintiff would succeed in an action at law—Not merely a legal right but actual injury must be shown—Public convenience—Laches or acquiescence in encroachment—Injunction dissolved in part.

The plaintiff owned mills on the lower part of the stream, the defendant owned mills higher up and had penned back the water. Plaintiff had already recovered nominal damages in the Supreme Court, (Howatt v. Laird, ante p. 7) for the injury to his right. The Bill alleges that since that Judgment the defendants have, at different times, penned back the water so as to impede the working of plaintiff's mill. An Injunction was granted *ex parte* to restrain the defendant from so penning back the stream and a motion was now made to dissolve it. There were two mills on the lower dam, one of which was formerly owned by the owner of the upper mill. It was argued that this unity of possession having existed extinguished the original right of the lower mill to the natural flow of the water, but the two principal questions on which the case turned were:—

1. Whether the riparian owner can daily interrupt the natural flow of the stream and detain the water for such times as may be necessary to drive his mill, without subjecting himself to an action by a lower riparian owner for an injury *to his right*, although such interruption cause no actual damage to the lower owner.
2. Whether after the lower owner has established his right in a Court of Law, this Court (when no actual damage is sustained) should interfere to restrain the upper owner from continuing the interruption.

Held, (Peters M. R.) that the unity of possession had not extinguished the right to the natural flow.

2. That the riparian owner by interrupting and detaining the water would render himself liable to an action by the lower owner, without actual damage to the latter, as decided by the Supreme Court in the action at law between the same parties, (ante p. 7).
3. That the right of the plaintiff to the interference of the Court, rests not merely on his showing a bare legal right, or on his

having obtained a verdict establishing it, but on his also showing an interruption of that right attended with such actual loss or inconvenience to him as on equitable principles should be prevented and that the plaintiff's laches and the public convenience should be considered.

4. That the injunction should be dissolved in part.

The Solicitor General for the plaintiff.

Mr. Lawson and Mr. C. Palmer for defendant.

PETERS M. R. In this case an injunction has been granted *ex parte*, restraining the defendant from penning back and interrupting the stream of a natural watercourse. The plaintiff is the owner of certain mills on the lower part of the stream and the defendant is owner of certain other mills higher up. The Bill states that in consequence of the water being penned back by the defendant for the use of the upper mill, its regular flow to his mill was interrupted, for which he brought an action in the Supreme Court against the defendant George Laird and one Benjamin Crew, and recovered a verdict for nominal damages of one shilling, on which verdict after argument the Supreme Court gave judgment on the ground that though no actual damage was found, it was an injury to his right. The Bill further states that since such judgment the defendant has at different times penned back the water so as to impede the working of plaintiff's mill, thereby causing him serious damage in his business. A motion is now made to dissolve the injunction and numerous and lengthy affidavits have been produced on both sides.

I have attentively read the bill and affidavits, and paid great attention to the arguments on both sides, and I cannot come to the conclusion that the plaintiff has sustained any considerable damage from the acts of the defendant. The Bill certainly states that the plaintiff's mills have been stopped on several occasions for want of water, and the affidavit of Joseph McDonald states two occasions in July and August last, when there was a

deficiency of water which he found to be caused by detention at the defendant's mills. But though on a few specific occasions some actual inconvenience may have been felt, the affidavits of the defendant and the whole circumstances of the case show that no such loss has been or is likely to be sustained as would call for the continuance of the injunction on the ground of irreparable injury to the property or business of the plaintiff. I do not give much weight to the affidavits of the various persons who have deposed on behalf of the defendant, unless when they are supported by the probabilities of the case, because those affidavits are very largely composed of mere opinions and belief, and I must observe that in cases of this kind where a great deal of feeling evidently exists, such affidavits should be cautiously received, as men are very apt to believe what they wish and opinions may be composed of very elastic materials. The probabilities and features of the case coupled with certain facts positively stated weigh far more with me.

I find from the affidavits that the defendant's mills are now driven with less water than formerly, and that if such be the fact, the water must be penned back by the defendant at his mills during the night; then as all the water so collected must come down during the day, I cannot see how it can injure the plaintiff in respect of his present works. I can easily understand that if the flow of the stream was interrupted during the day just when the defendant choose, or if the plaintiff instead of his present works, had some small machinery requiring a very small but constant supply of water, that the interruption in the first case or an interruption or increased quantity of water let off in the second might be very injurious to him; but I cannot see how under these circumstances it can be seriously injurious to the plaintiff's present mills. This to be sure is only my opinion, and being the opinion of a person uninformed in such matters is not of much value. But the plaintiff

should offer the evidence of persons acquainted with such matters if he expects an uninformed person to entertain a different opinion.

Then again I do not find the plaintiff supporting his case by the description of evidence I should expect in such a case. The evidence of persons in his employ is no doubt good, and for some purposes the very best that could be offered—as when they depose to some fact peculiarly within their own knowledge, as the depth of the water they measured in the dam for instance, or that on such an occasion when they wanted water they found the defendant holding it back; but when a man complains that grist has been turned from his mill in consequence of another detaining the water, the kind of evidence which would then be best would be that of persons who had been in the habit of grinding their corn with him, but who could state that the water being now less regularly supplied they were longer detained, or that from the uncertainty of his having water they had ceased going to his mill. It is said the persons in the vicinity of the defendant's mill have been combined against the plaintiff in favor of the defendant, but there must be many persons near the plaintiff's mills whose convenience and interest would lead them to support his right rather than the defendant's wrong, and the want of their testimony must, in considering the question, weigh against him.

Then again I find that the defendant's mill was erected in 1838, and though it is said it worked less regularly still it worked and with more water than it uses now, and yet until 1848 or 1849 the plaintiff does not appear to have complained of its injuring him. On the contrary, about 1844 he tells Clarke and David Lowther that instead of being an injury it had proved a benefit to him. I by no means agree with the defendant's counsel as to the effect of this expression. I merely look on it as the bantering of one rival miller respecting his opponent's mill. I do not think it a license or such an acquiescence as under any

circumstance would amount in law to a surrender of his right to the uninterrupted flow of the stream. But I do think if the detention of the water had been seriously injurious to him he would not have used it. All these circumstances lead my mind to the conclusion that no such irreparable injury has been sustained as would warrant the continuance of the injunction on that ground—a conclusion in which I am much strengthened by the fact stated in the affidavit, and admitted in the argument that on the trial at law on very similar evidence, the jury found no special damage but merely a frequent penning back or interruption of the stream by the defendants.

On the other hand the affidavits and arguments at the bar satisfy me that the defendant has since the trial been in the habit of frequently interrupting the natural flow of the stream, and penning back the water for the use of their mill, perhaps more cautiously, but in very much the same manner as he was accustomed to do before the trial. It is distinctly stated in the bill and sworn to by the plaintiff, that after the trial the defendant at different times penned back the water for the use of his mill and thereby interrupted its natural flow. The fact was a most material one, and if untrue should have been directly denied by the defendant, but he has not done so. George Laird in his affidavit says, that since the judgment of the Supreme Court this deponent's sole object has been to conform to the said judgment as near as justice and equity would allow in the use of the said stream of water; and that he has not nor hath any person on his behalf materially diverted, stopped or altered the said stream; that the water gates are open on all nights, and that the working of the said mill during each day, as he works it, naturally keeps the said water from being penned back or interrupted. Now this is no denial of the alleged fact; it amounts merely to this, that in the defendant's opinion he has not materially

interrupted the stream, but the materiality of the interruption is a question of law which it is not for him but for the Court to decide. He states again that the waste gates are open on all nights, but this is not saying that they were open during all nights. It might be quite true that they were open on all nights, and yet that during a considerable portion of every one of those nights they were shut. The affidavit seems drawn principally with a view of contradicting the damage to his business of which the plaintiff complains, and for that purpose in connection with other facts, is sufficiently pointed in its allegations, but it seems cautiously to avoid an admission of actual stoppage, though apparently unable to deny it. And indeed such denial would be inconsistent with the whole argument for the defendant, in which it is constantly averred that his mills will be rendered useless unless he is allowed to pen back the stream for such a time as will raise a head of water to work them. It is stated by Mr. Palmer that an interruption of an hour and a half or two hours in each twenty-four hours is sufficient to raise such a head. But if any argument was to be raised on the precise periods of time the defendant required to interrupt the flow of the stream to raise a head, it should have been distinctly stated in his affidavit, and not left to inference on the mere assertion of counsel.

To meet this, the plaintiff in his affidavit, swears positively that from the weakness of the stream it requires sixteen hours in ordinary seasons to collect water enough to drive his mill eight hours, and from this he knows it to be impossible for the defendant to work his mill with effect one hour, if the natural flow of the stream was allowed to pass the previous night. And again he swears positively that on two different occasions in September last, when he passed near the defendant's mills, he each time particularly observed the water "wholly penned back by the defendant's dam, none being allowed to

escape through the flume or waste gate or by any other means."

Joseph McDonald also, who has worked the plaintiff's mill, swears that if the water were allowed to flow all night without interruption, the defendant's mill in ordinary seasons, would not have sufficient water to grind one hour with effect, and (as I before shewed) he states two occasions on which he found them holding back the water. It is true the defendant's mill may work with far less water than the plaintiff's, but I can hardly imagine that there can be such a difference between them, that when sixteen hours are required to collect water to drive the plaintiff's mill eight hours, two hours will collect sufficient to drive the defendant's mill all day. At all events the defendant was best able to tell the precise time he required to stop the stream during each twenty-four hours, and as he has not done so I am bound under the affidavits, to believe that to work his mill so constantly as he states he works it, he is in the habit of interrupting the natural flow of the stream for much longer periods of time, although as I have already said, not in such a manner as to have caused any serious loss to the plaintiff in his business.

Upon this state of facts the case turns principally on two questions.

First, whether the owner of land through which a natural water-course flows can daily interrupt the natural flow of the stream, and detain the water for such spaces of time as may be necessary to drive his mill without subjecting himself to an action by the riparian owner lower down for an injury to his right, although such interruption and detention cause no actual damage to the lower owner in respect of the purposes to which as yet he has applied the water?

Secondly, if he can, whether after the owner lower down has established his right in a court of law, this Court (where no actual damage is or will likely be sus-

tained) should interfere to restrain the upper owner from continuing such interruption and detention of the water?

But before considering these questions it is well to advert to some minor points made during the argument. It appears that the plaintiff's saw mill (in the same dam as his grist mill) was originally leased by the proprietor to a third person, and that up to the time of the plaintiff's purchasing it the water in the dam was divided between the saw and grist mill. By the affidavit of Donald Palmer it appears that about 1841, he, Donald Palmer, and his brother became the owners of the upper mill by assignment from Daniel Crew the original lessee, that whilst he and his brother continued so possessed of the upper mill, about the year 1842, they purchased the saw mill from the tenant, and on the expiration of the term they obtained a new lease of the saw mill from Col. Fane, the landlord of both upper and lower mills. That whilst the deponent and his brother so held the saw mill and the upper mill they used the water of the stream for the benefit of both mills, in the language of the affidavit "the one subject to the use of the same stream for the other, each fairly participating in the benefit and use thereof." That the plaintiff afterwards purchased the saw mill from the deponent and his brother, which the deponent says "he considered he took subject to the same rights and restrictions as he and his brother held and enjoyed the same under." On this it was argued for the defendant that there having been a unity of possession in Donald Palmer and his brother, in the saw mill and the upper mill, the original right of the saw mill to the natural flow of the water was extinguished and must be held subject to the right of the upper mill, and the plaintiff claiming through Donald Palmer and his brother, was therefore bound by the right so supposed to be obtained for the upper mill.

To decide this point it is not necessary to follow all the arguments gone into at the bar. It is sufficiently clear that the plaintiff, even when Donald Palmer and his

brother held the saw mill, had a right to one half the *momentum* of the stream for his own benefit, and no user of the water for the benefit of the upper mill, however expressly or impliedly then made by Donald Palmer and his brother to abridge the privilege of the saw mill, could control or affect the plaintiff's share of the water power, unless (which is not the case) twenty years acquiescence on his part appeared. Besides it is expressly laid down in Angell on water-courses, (1) that the right to the natural water-course is not extinguished by unity of possession in any case, and the same point was decided in *Wood v. Waugh* (2).

It was contended at the bar that an injunction could not be granted until a trial at law directed by the Court had established the plaintiff's right, and that the trial which has been had in this case is not sufficient for that purpose. All the law requires is that the legal right of the plaintiff in the matter in dispute should have been ascertained. Whether it be ascertained by an action brought before the suit in this Court is commenced or by an action brought afterwards by direction of this Court can make no difference. In *Hanson v. Gardiner* (3) Lord Eldon says, "I think myself authorized to take what passed at law as if an action had been directed by the Court." And in *Thomas v. Jones* (4) where the plaintiff's right was established in an action at law, brought by the plaintiff and not in an issue directed by the Court, a perpetual injunction was granted.

The two important questions above mentioned remain to be considered.

The first, viz., whether the riparian owner can daily interrupt and detain the water for the use of his mill, without being liable to an action by the owner lower down, has been already fully considered in the judgment

(1) Angell, Sect. 103.

(2) 13 Jur. 742,

(3) 7 Ves. Jun. at p. 311.

(4) 1 Y. & C. 510.

of the Supreme Court in the action at law between these parties, (1) and as I see no cause for changing the opinion I then entertained, it is unnecessary again to enter into the reasons which were then fully stated. The case of *Wood v. Waugh*, (2) is however so applicable to this point that I will briefly state the points there decided. In that case (like the present) the defendants were owners of mills higher up and the plaintiff of mills lower down on the same stream. The plaintiff complained first, that defendants fouled the water. The special verdict found it was so dirty before that the dirt thrown in by the defendants caused no actual injury to the plaintiff. The Court held, notwithstanding, that as by continuing to do so for twenty years the defendants would gain a right to foul the water, the plaintiff was entitled to recover. Secondly, the plaintiff complained that the defendants had wasted the water. The special verdict found that the water was used by the defendants' steam mill. That about five per cent. of the water was lost by evaporation in passing through the boilers, and that subject to that unavoidable loss the whole of the water reached the plaintiff's mills. The Court held he was entitled to the whole of the water and therefore to recover for this also. Thirdly, the plaintiff complained as he does here that the defendants had stopped and hindered the water from running and flowing in its usual course to his mill. The special verdict found that the defendants detained the water in a reservoir for the use of their mill, and that after using it the whole as it does in this case, reached the plaintiff's mills. The Court after referring to the doctrine of Chancellor Kent, (which was here relied on for the defendant) say that if the water is diverted into a reservoir and there delayed an action seems maintainable, and the plaintiff had judgment for that detention also. I cannot see any distinction between that case and the present, and it seems to me decisive on this point.

(1) Ante p. 7.

(2) 18 Jur. 742.

The last question is, whether this is a proper case for the preventive interference of this Court?

For the plaintiff it is insisted that his legal right having been established, this Court can look at nothing else, but is bound to protect it. For the defendant it was strongly urged that there was here no destruction or irreparable injury, and therefore the Court could not interfere, and *Hanson v. Gardiner* (1), *Crowder v. Tinkler* (2) and the *Attorney General v. Hallet* (3) and other cases were cited in support of the last proposition, but those were cases where the injunction was applied for or had been granted before the right had been established at law. Where destruction or irreparable injury is threatened and the legal right is doubtful, Courts of Equity interfere by injunction to preserve and keep things as they are until the legal right is ascertained by a trial at law. Thus in the *Attorney General v. Hallet* the Court refused the injunction on the ground that the injury complained of was not irreparable in its nature, but Alderson B. expressly says that if the right should be established at law the plaintiffs would be entitled to an injunction. But when, as in this case, the right has been established at law, there the jurisdiction is much wider. Then when destruction or irreparable injury is threatened, or when the injury complained of cannot be adequately compensated by damages at law, (as loss of trade for instance,) or where it is such as from its continuance must occasion a constantly recurring grievance, and will therefore require a multiplicity of suits for its redress, Courts of Equity interfere to prevent it.

In this case no destruction or irreparable injury is threatened. Serious injury to the plaintiff in his business is negatived by the case made for the defendant. But from the nature of the injury the grievance will be constantly recurring, and the question is whether as the loss

(1) 7 Ves. Jr. 305.

(2) 19 Ves, 617.

(3) 16 M. & W. 568.

it occasions the plaintiff is nominal and not actual, it amounts to that kind of injury which (though constantly recurring) a Court of Equity should interfere to prevent?

Both Mr. Daniel and Judge Story, in speaking of injunctions against private nuisances, say the interposition in these cases is founded on the general restraining of irreparable mischief or on the preventing of multiplicity of suits, but that it is not every case which will furnish a right of action which will justify the interposition of a Court of Equity to redress the injury or remove the annoyance. There must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or as from its continuance or permanent mischief must occasion a constantly recurring grievance. For which they both cite *Coulson v. White* (1) which merely says "that if a trespass is so long continued as to become a nuisance, in such a case the Court will interfere and grant an injunction to restrain the person from committing it." In this case (which is very shortly reported) it is likely that the act producing actual injury (as in the *Attorney General v. Hallet*) was done on the plaintiff's land. The other cases cited by these authors is the *Attorney General v. Nichol* (2). In that case an injunction had been granted against obstructing ancient lights. Lord Eldon says "cases may exist upon which this Court could not interfere, yet an action on the case might be very well maintained. And he dissolved the injunction upon the defendants' undertaking, if the verdict should be against him, to remove such building "as should be proved to affect the ancient lights in a material and improper degree." Both the expressions of Lord Eldon and the terms of the undertaking he imposed on the defendants; to remove what affected the lights in a "material and improper degree," show that he considered it quite possible that the plaintiff might obtain a verdict for such an obstruction as might amount to a

(1) 3 Aitk. 21.

(2) 16 Ves. 338.

nuisance at law, without being so hurtful to him as to entitle him to an injunction absolutely restraining the infringement of the legal right.

In *Wynstanley v. Lee* (1) the Master of the Rolls, in a case for obstructing ancient lights, says, "It may be perfectly clear that the plaintiff is entitled to succeed in an action, and yet a Court of Equity will not interfere by injunction. The plaintiff is bound to show not only a legal right to the enjoyment of the ancient right, but that if the building of the defendants is suffered to proceed such an injury will ensue as warrants the Court to interfere."

The doctrine laid down by the Vice Chancellor in the *Attorney General v. Eastern Railway Company*, (2) bears closely on the point under consideration. In that case the defendants had committed an infringement of a strict legal right, to restrain which an injunction had been granted *ex parte*. In giving judgment he says, "I cannot however see that any practical injury has been done, and considering all the circumstances of the particular dispute before me, I am of opinion that it is not a necessary duty of the Court to interfere by injunction. In all cases it is subject to the judicial discretion of the Court according to the circumstances. The infringement of a strict legal right goes a great, but not always the whole way, to induce the Court to continue an injunction, and the Court will endeavor to do substantial justice between the parties." And he suspended the injunction on the defendants undertaking to keep the way open in such a manner as would produce no real inconvenience to the plaintiff without entirely restraining the works of the defendants.

Some cases from Angell on Water-courses were relied on for the plaintiff, but in all of them the diversion of the stream seems to have caused or been likely to cause

(1) 2 Swanston 333.

(2) 7 Jur. 806.

actual injury to the plaintiff. In *Thomas v. Oakley* (1) the stone from the quarry which was taken was parcel of the inheritance and therefore actually injurious.

The law as laid down in *Webb v. The Portland Manufacturing Company* (2) reported in the Appendix to Angell, is certainly very strong against the defendant in this case. It was a case on a bill for an injunction, in some circumstances very similar to the present. But though stated in the case that the diversion caused no actual damage to the plaintiff's mills, yet as the judge observed, it was hardly possible that there would not be actual damage to the plaintiff, as the diversion of the water must diminish the value of his mill privilege. And it seems to me this must have been the ground on which the injunction in that case was granted. If the doctrine laid down is understood as going to the extent that in every case where the verdict is obtained for the interruption of a stream which causes no actual damage to those below, a Court of Equity has no discretion, but is bound to grant an injunction, I think it goes beyond what the English cases warrant. The doctrine I draw from all these cases is, that the right of the plaintiff to the interference of the Court rests not solely on its clearly appearing he has a right, or on his having obtained a verdict establishing it, but on his also showing an interruption of that right, attended with such loss or actual inconvenience to him as on just and equitable principles should be prevented. Judge Story seems to entertain the same opinion, for in concluding his chapter on injunctions he says, "it may be remarked upon the subject of special injunctions that Courts of Equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunctions shall be granted or withheld" (3).

(1) 18 Ves. 184.

(2) 3 Sumner 189.

(3) Story, Sec. 959 b.

Such being the discretionary power committed to the Court it is bound to look at all the circumstances and varied bearings of each particular case before deciding. And where the thing complained of and which it is sought to prevent, is highly beneficial to one party and not injurious to the other, it is prudent to ponder well before it allows its strong arm to be called into action. At law no inquiry save into the strict legal right can be tolerated; here other matters demand attention. And although we may not attempt to restrain a legal right the case may be such as should prevent a Court of Equity moving to enforce it. Or if it does move, it should take care so to mould its decree as to meet the ends of substantial justice. The circumstances of the country in which we are may here also properly receive some consideration. And there is high authority for saying that where great and general public inconvenience would ensue, and where the interference of the Court will have the effect of interrupting men in those modes of enjoying property which are innocent in themselves, hurtful to none, and beneficial to all, we should be very cautious how we interpose merely to prevent some possible or contingent evil. In such cases it seems to me, while we acknowledge the jurisdiction we may, in the words of Lord Brougham in *Blakemore v. The Glamorganshire Canal Company* (1), decline to exercise it any further than is necessary to prevent real injury being done.

In the present case it seems clear that the legal right of the plaintiff if pushed to its full extent will almost if not quite stop the working of defendant's mills and entirely destroy their value. That although the penning back of the water at times especially selected by the defendant may be prejudicial to the plaintiff, yet by doing so under certain restrictions it is hardly possible he can be injured. Under these circumstances it appears to me substantial justice will best be done between these parties by adopting

(1) 1. My. & K. 165,

a similar course to that taken by Lord Eldon in the *Attorney General v. Nichols*, (1) and by the Vice Chancellor in the *Attorney General v. The Eastern Railway Company*, (2) and as I find adopted in many other cases to which I have referred in considering this case, viz., by imposing such terms on the defendant, in using the water as will prevent actual injury to the plaintiff without rendering his property useless, and declining to interfere further.

There is another consideration which I think renders it extremely doubtful whether the plaintiff is entitled to insist on the interference of the Court for the protection of his strict legal right to the full extent he desires. It is a rule of Equity not to interfere if a plaintiff has been guilty of laches, or where by his conduct he has apparently acquiesced in an encroachment on his rights. In *Smith v. Clay*, (3) Lord Camden says, "a Court of Equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slumbered upon his rights and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith, and reasonable diligence; where these are wanting the Court is passive and does nothing." Now the defendant's mill was erected in 1838. Granting that it was not worked so regularly as it has been for the last few years, yet it was worked and must almost daily have interrupted the natural flow of the stream. Yet the plaintiff allows those in possession of the upper mill to interfere with the water apparently without much objection until about 1847. And after the interference had continued for several years, he tells David Lowther and Clarke, instead of being an injury it was a benefit to him. Now although these facts do not amount to such a license or statutory bar as would furnish a defence at law, it certainly looks

(1) 16 Ves. 388.

(2) 7 Jur. 806.

(3) 8 B. C. C. 689.

very like slumbering on his rights, and appears to me to approach very near to that state of circumstances in which Lord Camden says the Court should be passive and do nothing except indeed so far as it is necessary to prevent such an interruption of the water as will not injure the plaintiff's present works.

Looking at the whole of the case, I think to a certain extent the injunction should be dissolved, but I think it should be dissolved only to this extent, viz., to allow the defendant to pen back the water for a certain number of hours during each night for the purpose of raising a head, but not to allow him to interrupt it at any other time.

The order will therefore be that this injunction, so far as relates to penning back the water, or interrupting the flow of the stream, between the hours of 11 o'clock at night and 4 o'clock in the morning of each day be dissolved, but that with respect to all other times it be continued.

The question of costs I reserve until the hearing.

AT CHAMBERS, 1851.

———V. IRVING.

Bankruptcy—23rd section of English Statute 5 and 6 Vic. Cap. 122, granting freedom from arrest until final examination does not extend to Colonies—Certificate of Bankruptcy would extend—Affidavit made in England must be authenticated here.

The defendant was arrested here for a debt contracted on this Island. He applied to be discharged under the 23rd section of the English Statute 5 and 6, Vic. Cap 122, on the ground that he had been duly declared a Bankrupt in England and had been granted to 20th August next, to finish his examination, and therefore was not liable to arrest until that time had expired. The plaintiff opposed his application on the grounds:—

1. That the summons in Bankruptcy and endorsement thereon are not properly authenticated so as to prove them to be really documents under the hand of an English Commissioner of Bankruptcy.
2. That admitting the summons and endorsement to be properly authenticated, the 23rd section of the English Statute does not apply to the Colonies.
3. Even if it does, the privilege from arrest is excluded by the Small Debt Act of this Island.

Held, (Peters J.) that the summons and endorsement were not properly authenticated, not being verified by an affidavit made before an officer of this Court.

2. That though an English "Certificate" of Bankruptcy would be a bar to an action in this Court, yet the interim protection afforded by the 23rd section of the English Act does not extend to the Colonies.
3. The Small Debt Act does not apply to this case.

PETERS J. The defendant in this case has been arrested under an execution issued out of the Court for the recovery of Small Debts, for a debt contracted in this Island, and applies to be discharged under the English Statute, (1) alleging that he has been duly declared a bankrupt in England, and that the Commissioner of Bankruptcy there, has by an endorsement on the back of the summons

(1) 5 & 6 Vic. Cap. 122, Sec. 23.

pursuant to the Statute, granted him time until the 20th of August next, to finish his examination, and that he is consequently not liable to be arrested in this Colony until that time has expired.

This motion is resisted by the plaintiff's counsel on three grounds :—

First.—It is contended that the summons and endorsement thereon are not so authenticated as to prove it really to be a document under the hand of an English Commissioner of Bankruptcy.

Secondly.—That admitting the summons and endorsement to be sufficiently authenticated, the 23rd section of the English Statute does not apply to the Colonies.

Thirdly.—That if it does, the privilege from arrest in this case is excluded by the provisions of the Small Debt Act of this Island (1.)

With respect to the first objection, that the proceedings are not properly authenticated, the declaration of J. Holmes authenticates the summons and proceedings in the usual manner, this declaration is certified by the certificate of Surr, who describes himself as a notary public of the City of London, and the fact of his being a notary public is certified under the seal of the Lord Mayor.

The affidavit of William Burnie, which has been made here since the rule was granted cannot be looked at by the Court. If the defendant wished to use a supplementary affidavit he should have applied to the Court for leave to withdraw his motion and move it again, or he might, before drawing up his rule have applied to the Court for leave to draw it up on reading the supplementary affidavit. *Salloway v. Whorewood*, (2) is certainly an authority in favor of admitting the affidavit, when only confirmatory of those used in moving for the rule, but *Same v. Same* (3)

(1) 7 Vic. Cap. 2, Sec. 34 repealed by 23 Vic. Cap. 16.

(2) 2 Salk. 461.

(3) 2 C. M. & R. 637 : S. C. Ty. & G. 146.

where that case was relied on was determined contrary to it, and in *Bury v. Clench*, (1) it was laid down that a party must apply to the Court for leave to withdraw his rule and move it again. The affidavit of the defendant does not help his case on this point, as he does not authenticate the proceedings of the commission at all, nor does he swear that his time has been extended, but only that "a further time was allowed by the said John Sheppard" until the 20th day of August, now next, "as appears by the summons and endorsements thereon annexed."

The question therefore is whether the certificate of the Lord Mayor or Surr, is a sufficient authentication of the fact that E. Golburn is a Commissioner of Bankruptcy, and that the paper purporting to be the summons is really signed by him. England with respect to this question must be considered in the same light as any foreign country. Both Mr. Tidd and Mr. Archbold (2) in their books of Practice lay it down, that an affidavit made in a foreign country must be authenticated by an affidavit made before an officer of the Court in England. In *Omealy v. Newell* (3) Lord Ellenborough in delivering judgment on a motion to discharge a party from arrest on an affidavit made out of England says, "we are of opinion that the practice itself may be sustained in point of law as to affidavits made out of England and verified here. In *French v. Bellew*, (4) the signature of the Chief Justice of Ireland was verified by affidavit made in England. Some cases have been decided where acknowledgments of fines by married women were directed to be taken on affidavit made out of England, and certified by a notary public, but they appear to rest on the provisions of particular statutes, rather than on any general principle of law. It was urged by the defendant's counsel that

(1) 6 Jur. 346, S. C. 1
Dowl. N. S. 848.

(2) 12th Ed. 1627.

(3) 8 East 364.

(4) 1 M. & S. 302

though affidavits thus authenticated might not be sufficient in ordinary cases, (such as arrests for debt for instance,) yet they were sufficient in applications of this kind to call on the other side to answer. But if affidavits are necessary at all, I can see no distinction between the authentication requisite to satisfy the Court of their being genuine where used in moving for rules and any other case. In both cases the Court before acting on them must see first that the person administering the oath had authority to do so, and secondly that the signature to the jurat is the signature of that person. In *Dalmer v. Barnard* (1) where on showing cause against a rule for delivering up a bond and warrant of attorney to be cancelled, an objection was taken to an affidavit sworn before the chief magistrate of the Isle of Man and authenticated by an affidavit made in the Court of King's Bench, it does not appear to have been thought either by the counsel or the Court that any such distinction existed; the observation of the Court was, "as to this not being properly authenticated, the affidavit of Christian in this Court is a sufficient answer. The conclusion however, to which the Court have come on the second point renders it unnecessary to give any decision on this; had it been necessary we might perhaps have required more time to consider before pronouncing judgment."

As to the second point. There is no doubt of the power of Parliament to bind the Colonies where an Act shows a clear intention to do so, and I think it is clear that a "Certificate" of Bankruptcy obtained in England would be a bar in this Court to an action for a debt contracted here. But the question here is, whether it was the intention of Parliament that the 23rd section of 5 and 6 Vic., Cap. 122, should extend to the Colonies. That section after providing that the bankrupt shall be free from arrest during such time as shall be allowed him to finish his examination, and for such time after finishing

(1) 7 T. Rep. 251.

his examination, until his certificate be allowed and confirmed as the Court shall appoint, goes on to enact, "That if such bankrupt shall after his surrender, be arrested within the time aforesaid, he shall on producing his summons, signed as required by this Act, to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged, and if the officer shall detain him after he shall have been shown such summons, he shall forfeit to the bankrupt £5 for every day he shall detain such bankrupt, to be recovered by action of debt in any Court of Record at Westminster, in the name of such bankrupt, with full costs of suit." The difficulty an officer would experience in a foreign country, in ascertaining whether the summons produced by a person he had arrested was genuine or not, must be very obvious, as he must act on it immediately or at least after a reasonable time for inquiry into its authenticity. In England the "Gazette" and many other papers contain the names of bankrupts, the dates of fiats, etc., and from those and many other sources, the officer there would have no difficulty in satisfying himself on this point. But how is the officer to do this in a distant country where there are no persons in any way concerned with the English Bankrupt Courts, and where no paper published by authority or otherwise, contains the names of bankrupts, dates of fiats or any information on the subject, and where few or none can be supposed to know who the English Commissioners of Bankruptcy are or be acquainted with their signatures? We cannot suppose Parliament could have intended to impose a duty on the officer, the right performance of which would be so impracticable, and to compel him to discharge his prisoner, merely because he produces a piece of paper, the genuineness of which he has no means of ascertaining and which if not genuine will be no defence for him in an action for the escape of the prisoner he has (as he supposed) legally discharged. But the Act provides that the penalty is to

be recovered “by action in a Court at Westminster.” We are endeavoring to find out the intention. Now if it had been intended that this section should apply to the Colonies, would it have limited the right to sue for the penalty to the Courts at Westminster, and at the same time make the right to be discharged dependant on the production of the summons everywhere? It can only be on the supposition that the officer has or can obtain satisfactory evidence of the authenticity of the summons that the Act compels him to discharge his prisoner. Why then when the officer is so satisfied should the bankrupt not have a right (if improperly detained) to sue for the penalty in the country where it is incurred? We cannot suppose Parliament intended to make the bankrupt’s right to recover the penalty dependant on the improbable chance of his finding the colonial officer at some future time in England. In the case of a “Certificate” these inconveniences do not arise because the bankrupt must plead it and if issue is taken on it must prove it at the trial. The 2 & 3 Wm. 4, cap. 114, section 9, enacts that depositions and proceedings purporting to be sealed with the seal of the Court of Bankruptcy, shall be received as evidence of such documents respectively; yet in *Clark v. Mullick*, (1) though it was not denied that the property of the bankrupt passed to the assignees, it was held that that section of the Act did not apply to the Colonies. In the *Mayor of St. John v. Lockwood* (2) the Supreme Court of New Brunswick refused to discharge a prisoner under similar circumstances.

It was urged at the bar that the protection would be of no use unless the bankrupt could go to the country where his books and the bulk of his property are, and it is also stated in the defendant’s affidavit that he came here to assist in collecting his debts, but I do not see that it was necessary for him to come here before obtaining his

(1) 3 Moore, P. C. 252 at p. 260. (2) 2 Kerr, 8.

certificate. All that is required in the Bankruptcy Court is, that the bankrupt should make a full disclosure of his affairs, if his books were here he might have had them transmitted to him in England. The argument that his presence here was necessary to collect his debts, tends to show the danger of acceding to such applications, as a bankrupt might then gather up his books and such effects as he could lay his hands on, and by leaving the Colony before the protection expired, go where he pleased, or he might go to England, and in one month after this Court had discharged him from arrest he might be refused his certificate there, and then become liable to be arrested again, but the creditor here who had been diligent and arrested him must lose his debt, as the bankrupt would then be beyond the jurisdiction of the Court. The English creditor, on the contrary, at whose suit he might have been discharged, could watch the proceedings and when the certificate was refused, arrest him again, thus the application of this section to the Colonies would have the effect of placing the Colonial creditor in a much worse position than the English creditor. Again during the running of the protection and before a full disclosure, and while his property is in some degree under the bankrupt's control, if the bankrupt was found to be secreting his books or making away with his property, etc., the Court in England could withdraw the protection at once and take measures to preserve the effects; but if he were found doing so here, what power has the English Court of Bankruptcy over him here? He is beyond their immediate control, and the creditor here might see him making away with property which ought to be applied in liquidating his debt, and yet neither be able to arrest him, or procure the interference of the Bankruptcy Court in time to save it for him. These last reasons it is true, only show the inconvenience which might arise from the operation of this section in the Colonies, but where the language of a statute is ambiguous such reasons are

entitled to consideration, as if Parliament had intended a section which might so operate to apply, the intention would have been clearly expressed, and not left in uncertainty. We are therefore of opinion that this section does not apply here, and therefore this rule must be discharged.

As to the third point the defendant does not claim any privilege not to be sued in the Small Debt Court, and therefore is not within the 34th section 7 Vic. cap. 2. The section applies only to cases of privilege to the person, in consequence of some office, as “an attorney,” for instance, and not in cases where the defence is, that the action is barred in all Courts.

Rule discharged.

IN CHAMBERS.

PIDWELL v. McDONALD.

Summary action—Part payment—If balance under £20 summary action lies.

The P. E. Island Statute 26 Geo. III, cap. 13, section 1, provides that in actions where the debt or damages demanded does not exceed £20, the plaintiff may proceed in a summary way. The plaintiff stated that defendant had agreed to pay £30 for rent, of which £15 had been paid, and the plaintiff now sues for the balance in a summary way. The defendant pleaded to the jurisdiction, alleging that as the plaintiff had to show an original demand exceeding £20 a summary action would not lie.

Held, (Peters J.) that as the original debt was reduced by payment, the plaintiff might give credit for such payment and sue in a summary way for the balance.

PETERS J. The plaintiff in this case brings his action on the summary side of the Court. He states that the defendant agreed to give £30 for the rent of a house (under certain contingencies which happened); he proves that £15 have been paid, and he sues for the balance. The defendant contends that the house was only taken for half a year, and the amount paid was not a part payment of £30 but in full of all that was due, and that as the plaintiff has to show an original demand exceeding £20, his action should have been brought on the record side, and he therefore pleads in abatement to the jurisdiction.

The Act for the trial of causes in a summary way (1) provides “that in all actions of debt case, etc., where the sum or damages demanded shall not exceed £20, the plaintiff may proceed in a summary way. Numerous cases were cited at the bar which have been decided on the English Court of Request Acts, some of which turn on the particular provisions of acts dissimilar from this and have no application to this case; but others on acts very similar to that on which this question is raised. Several cases were adverted to where the debt was reduced by set off, and which were held not to be within

(1) 26 Geo. 3, cap. 13, sec. 1.

the Acts, because as the plaintiff could not compel the defendant to put in his set off, the plaintiff could not know whether the set off would be brought forward or not; but those cases do not apply here, because if the debt in this case is considered as reduced at all it is reduced by payment. And where a debt is so reduced the general tenor of the authorities is, that as the plaintiff knew that he had received payment he might give credit for it and sue for the balance. The act authorizes the action on the summary side where the damages demanded do not exceed £20. According to *Shaddick v. Bennet* (1) and *Drew v. Coles* (2) (the first decided on the London Court of Requests Act, and the other on the Bedford Court of Requests Act, the sections of which are in effect similar to the Island Act;) the amount recovered (unless reduced by a set off) is the criterion of the amount demanded. In the present case, all the plaintiff ought to recover after giving credit for the payment was the balance under £20. The debt demanded is therefore under £20, and so within the words of the Act.

But it was contended by the plaintiff's counsel, that in this case as the plaintiff had to establish his right at one time to a sum of £30 which is disputed, and as the jury would have to decide that before his right to a verdict for anything could be established, therefore the class of cases to which *Drew v. Coles* (2) and *Shaddick v. Bennet* (1) belong do not apply; and at the trial it appeared to me that this view of the case was correct but on close examination I think it erroneous. In all cases where the debt has been reduced by payment, evidence of the larger amount must be given before it can be shown to be reduced by payment. In *Horn v. Hughes* (3) the plaintiff's witness proved a debt of £6 9s 0d, and then proved £2 paid and it was held to be within the London Court of Request Act, the wording of the 12th section of

(1) 4 B. & C. 769.

(2) 1 D. P. C. 680.

(3) 8 East 346.

which Act is not essentially different from the 1st section of our summary Act. The cases which appear contrary to this doctrine are decided on statutes containing a special clause restraining the jurisdiction to causes where the original demand did not exceed £5.

It is further urged by the defendant's counsel that if the plaintiff satisfies himself with proof of the last half year's rent, then they have a right to put the judgment against it, and then there is nothing due, and the *dicta* of the judges in *Woodham v. Newman* (1) is cited in support of this view of the case. But in that case the debt was reduced by set off; the judges in giving judgment put the case of a party having a large demand, waiving part so as to sue in the cheaper Court, in which case, as you cannot compel a man to set off his account, the defendant might bring his set off and defeat the suit or sue for it again, though in reality paid in the amount waived by the plaintiff before he sued; but in this case the plaintiff does not waive any part of his demand he says, "I had a demand against you for a year's rent, you paid me half a year's rent, contending that you owed no more. I have sued you for the other half and if you were ever liable for that you owe it still." It is true the party who makes payment may appropriate it to any account he likes, but when he once does so he cannot afterwards change it. Here the defendant himself appropriated it at the time of payment to the first half year, denying that he owed the second, he cannot now therefore say, I will appropriate the payment to the last half year for which you sue. The question as to the effect of the plaintiff receiving the money which was offered in full cannot arise in this stage of the cause in which issue is taken on a plea to the jurisdiction. And as the plaintiff demands a sum not exceeding £20 he has a right to sue on the summary side.

The rule must be absolute.

(1) 13 Jur. 456. S. C. 7. C. B. 654.

AUGUSTINE McDONALD V. FRANCIS LONGWORTH.

Absent Debtor—Trustee process—Insufficient notice of assignment—Chose in action not assignable at law.

The defendant was sued under the trustee process by C. & C. as a debtor to McD. (an absent debtor) the present plaintiff. On 11th September, 1849, C. & C. issued their attachment against McD. under the Absent Debtor Act, and on 11th December, 1849, served the summons on the defendant, who on the 12th made a deposition admitting £16 11s. 0d. indebtedness to McD. which was put in at Hilary Term, 1850. In July 1848, McD. assigned all his effects and credits to J. McD. as trustee for certain creditors mentioned in the assignment, which was by deed poll executed by McD. only, neither the trustee nor any of the creditors being privy to it. On 11th December, 1849, this action was commenced by the trustee in McD.'s name against defendant, who was also sued under the trustee process by C. & C. C. & C. had recovered judgment in the Absent Debtor Suit against McD. and the defendant had paid the amount due McD. to the sheriff on an execution issued by C. & C. under their judgment against McD. The defendant had no notice of the assignment when he made his deposition. The first notice of it was given in Court when the defendant's deposition was put in and read.

It was contended on behalf of the defendant,

1. That he had not sufficient notice of the assignment and having admitted assets was bound to pay the amount to the sheriff under C. & C.'s execution and was therefore discharged from liability to the trustee.
2. That the creditors had not assented to the assignment which was therefore void as against C. & C.

Held, (Peters J.) that sufficient notice of the assignment had not been given.

2. That the assignment was not binding as against C. & C.
3. That the subject matter in dispute, being a chose in action could not be assigned at law.

This cause was tried on 9th January, 1850, when the plaintiff recovered judgment for £15. 11s. 0d. On 12th January, a rule nisi was granted to stay execution issued

on this judgment, and on 19th January the rule was made absolute.

A rule nisi was taken out to rescind the above rule.

3rd November, 1851.

Mr. Edward Palmer shews cause.

Mr. C. Palmer, *contra*.

Cur. ad. vult.

24th January, 1852.

PETERS J. In this case the defendant is sued under the trustee process by Cushing & Clapp, as a debtor to Augustine McDonald (an absent debtor,) the plaintiff in the present suit. It appears that on the 11th of September, 1849, Cushing & Clapp, commenced their action by attachment against plaintiff under the Absent Debtor Act. On the 11th of December, 1849, they caused the summons to be served on the defendant. On the 12th of December the defendant made a written deposition admitting himself indebted to the plaintiff Augustine McDonald, in the sum of £16. 11s 0d. which was put in at Hilary Term, 1850. It further appears that in July, 1848, the plaintiff, McDonald, executed an assignment of all his effects and credits to John McDonell, as trustee for certain creditors therein named, according to the priorities therein mentioned, after liquidating whose demands the trustee was to have the residue of the proceeds to pay an unascertained amount stated to be due to him. The assignment is by deed poll executed only by the assignor, neither the trustee nor any of the creditors are parties or privy to it. On the 11th of December, 1849, this action is commenced in plaintiff's name (by the trustee) to recover the debt, for which the defendant is also sued under the trustee process by Cushing & Clapp. Judgment has been recovered by Cushing & Clapp in the absent debtor suit against the present plaintiff, Augustine McDonald, and the defendant has paid over the amount by his deposition admitted to

be due to the absent debtor, McDonald, to the sheriff on an execution issued under the judgment obtained by Cushing & Clapp against the plaintiff, McDonald.

It is contended, First, that Longworth, the defendant, had not sufficient notice of the assignment, and that having admitted assets he was bound to pay the amount to the sheriff under Cushing & Clapp's execution against the plaintiff, and that he is therefore discharged from liability to the plaintiff's trustee, John McDonell.

Secondly, that the creditors have not assented to the assignment, and that it is therefore void as against Cushing & Clapp.

As to the first point, it is positively sworn by the defendant in his affidavit, that at the time he made his deposition, viz., the 12th December, he had no notice of the assignment, but it appears that at Hilary Term, 1850, when the deposition was filed, and at which term the defendant should have appeared to submit to examination, he was absent in England, and his deposition admitting assets was the only examination taken. The affidavit of Mr. Palmer, the plaintiff's attorney, states that in Hilary Term, 1851, when the defendant's deposition was put in and read, he the said C. Palmer, produced the assignment and duly notified the Court and defendant thereof. But it appears that with respect to notifying the defendant Mr. Palmer must be mistaken, as the defendant was then absent and that the notification he alludes to must have been given to the defendant's attorney. The defendant should have been there to be examined, or should have applied to have the time for his appearance extended, and therefore we think the notice then given must be looked at in the same light as if the defendant had been there and received it himself. The question is, would this be a sufficient notice of the assignment? If it would then the defendant was bound to state it in his examination, and not having done so though he made himself

liable by admitting assets to pay Cushing & Clapp as attaching creditors, he must still (if the assignment be good) pay the amount over again to the trustee in this suit.

At common law a debtor is only liable to be sued by his creditor with whom he contracted. The Absent Debtor Act (1) extends this common law liability and subjects him under certain circumstances to be sued by a third person between whom and himself no privity of contract exists. If the debtor's creditor assigns the debt to a trustee, the trustee has only an equitable right to the debt assigned; all that is necessary to protect the debtor from injury is notice from the trustee of the assignment, and then he is in equity liable to pay to the trustee, and as at common law he can only be sued in the name of his creditor, he is in no danger of being compelled to a double payment of his debt, but where the common law liability is statutably extended and he is subject to an action, not only by his creditor, but also by a third person with whom he never contracted, the trustee to whom the debt is assigned must necessarily do something more to protect him than merely give him notice of the assignment. He must also furnish him with the means of making a good defence to the action brought by such third person against him, and as the time for making that defence under the trustee process, is the time at which the debtor served with such process comes in to be examined, it follows that the means of making such defence must be furnished him by the trustee in sufficient time to enable him to set it up, for if this is not done the person suing under the trustee process must recover against him. And this appears to be the doctrine of the Courts in the United States in acts, though more particular in their provisions, yet similar in principle to our own. Mr. Angell, in his book on Trustee Process, says, "A mere notification by the assignee that the debt

(1) 20 Geo. III, cap. 9.

is assigned to him, is doubtless sufficient to protect his rights against a mere voluntary payment by a debtor.

But such notification will not relieve the assignee from his obligation to furnish the debtor with the means of a defence against the assignee's creditor, if he neglected to do so, and in consequence of such neglect the debtor be adjudged the trustee of the assignor, the assignee will lose his right to recover the debt, even though his failure to furnish the debtor with the means of defending himself against the trustee process be in consequence of his ignorance of its existence, and even though the debtor have previous notice of the assignment and neglect to inform the trustee of the service of the writ upon him."

Now taking the production of the assignment by Mr. Palmer when the defendant's deposition was read as notice of the assignment, would that be furnishing the defendant with legal and sufficient evidence of the assignment in time to enable him to set it up as his defence? We think not. The mere production of a deed is no evidence of its authenticity. The defendant must have a right to have the assignment given to him in such reasonable time before his examination as will enable him to ascertain that it is authentic, but he can have no means of making the inquiry, if the first notice he has of it be placing it in his hand when on the stand undergoing examination.

Again as laid down in *Wood v. Partridge*, (1) the debtor sued under the trustee process may if he please take the responsibility on himself of determining upon the validity of the assignment, and may refuse to state it in his answer, and then he will be charged as trustee of the assignor under the trustee process, and will also be liable to pay the debt to the assignee if the assignment prove valid. But in the majority of cases the defendant would not be able to form any correct conclusion as to

(1) 11 Tyng. (Mass.) 488

the validity of an assignment placed in his hands while under examination. If he has the right of determining its validity he must be entitled to have the document, or an authentic copy of it furnished to him in such time before his examination, as will afford him a reasonable opportunity of perusing the document and ascertaining whether it be valid or not. What is a reasonable time must depend on the particular circumstances of each case, but we are clearly of opinion that in the present case evidence of the assignment was not furnished the defendant in sufficient time.

The conclusion we have arrived at on this point renders a decision of the other unnecessary, but as cases of this kind are becoming more frequent it is as well to consider it also.

In all cases of voluntary assignments to trustees for the benefit of creditors, until the creditors have assented the assignment is looked upon both at law and in equity as a mere power given by a debtor to his trustee to apply the property in payment of his debts, and is therefore revocable by the debtor. Thus in *Gerrard v. Lord Lauderdale* (1) property was conveyed to trustees to sell and after satisfying certain specified claims to divide the residue among scheduled creditors none of whom were parties or privies to the execution of the deed. The trustees after partially executing the trusts, concurred with the assignor in doing acts inconsistent with the subsequent trusts. It was held that a scheduled creditor could not enforce the execution of the trusts against the trustee, the conveyance being in the nature of a private arrangement for the personal convenience of the assignor and vesting no right in the creditors. And the same doctrine is laid down in *Wallwyn v. Coutts* (2) and *Acton v. Woodgate* (3).

(1) 2 Russ. & Myl. 451.

(2) 3 Mer. 707.

(3) 2 Myl. & K. 492.

The Absent Debtor Act (1) provides that "all the goods, effects, credits and estate of any kind whatsoever, of such absent or absconding debtor in the hands of his attorney, factor, agent or trustee, or under his care, or management at the time of his being served with the summons" shall be liable to the execution granted in the judgment against the absent debtor in the attachment suit. Now if a voluntary assignment to a trustee be a mere direction of the mode in which the trustee is to apply the proceeds and be revocable, the absent debtor may remove the property assigned at any moment, and it is in fact as much under his control as if no assignment had been made. And it is difficult to see how an assignment operating only in that manner can interfere with the right of attachment given by the statute "against all the goods, effects and credits of any kind whatsoever" of the absent debtor in the hands or under the management of his agent or trustee, unless a mere power of attorney given by an absent debtor would have the same effect, which it is quite clear it would not. It is true Mr. Justice Story in his book on Equity, 302, lays it down that the assent of creditors will be presumed until the contrary appears and that an assignment *bona fide* made by a debtor and assented to by the assignee, will be a valid conveyance and good against creditors proceeding adversely by attachment or seizure in execution for the property thereby conveyed at least, unless all the creditors for whose benefit the assignment is made repudiate it. The only English cases cited by Judge Story for this proposition are *Small v. Marwood* (2) and *Pickstock v. Lyster* (3). But *Small v. Marwood* only decided that the deed was not void, and as it contained a release that a trustee who was also a creditor had by executing it extinguished his debt. And in *Pickstock v. Lyster* it was held that a voluntary assignment though

(1) 20 Geo. III, cap. 9. (2) 9 B. & C. 300.
(2) 3 M. & S. 371.

not executed by the creditors was not void under the Statute of Elizabeth, and as the legal title to the property thereby conveyed vested in the trustees it was not liable to be seized under an execution against the assignor.

But though an assignment which is not void under the statute vests the legal title to the property in the trustee and is sufficient to defeat an execution which can only operate on property the legal title to which remains in the debtor, it does not necessarily follow that it must defeat an attachment under this Act.

The object and policy of the Absent Debtor Act seems to be to furnish a local remedy against the property of a debtor, who by withdrawing himself from the jurisdiction of ordinary process, deprives his creditors of the usual means of enforcing payment of their debts. For this purpose it not only allows a creditor to attach the property of his debtor before any debt is adjudged to be due, but it also permits the debtor by the trustee process to attach debts and credits which an execution could not touch. Now if a deed which (for want of the assent of creditors) is revocable by the debtor, can prevent an attachment, it appears to us that the object and policy of the Act may be entirely defeated, in as much as the debtor would then have power to suspend the right of attachment, by a deed depending for its validity on an assent which might never be given, and which by exercising his power of revocation, he himself may prevent from being given.

Again the object of the Act seems to be to afford a local remedy to creditors. But an absent debtor may assign to a trustee who is also beyond the jurisdiction; if the assent of creditors is to be presumed, the assignment must operate from the moment of its execution. Then if the trustee be absent the local remedy of creditors is gone. The body of the debtor is beyond their reach, and during the interval, before they can

notify their assent to the trustee so as to bind him to hold the property assigned, the debtor may have revoked the deed and resumed possession. Such a doctrine would open a wide door to frauds on creditors. A friendly trustee might withdraw large assets from the jurisdiction of the attachment law, and hand them over to the debtor in a foreign country, and which but for the deed by the debtors's own act made void, might have been secured for them by attachment.

But there is another reason particularly applicable to this case, where the subject matter in dispute is a mere chose in action. This cannot be assigned at law. The legal title to it still remains in the absent debtor. When on examination a trustee sets out an assignment, it is in the nature of a plea in bar to the trustee process. What would be the substance of a plea disclosing these facts? It would be this, that the legal title to the chose in action still remained in the absent debtor, who then and still has full power to apply the proceeds in any manner he may see fit. We think such a plea under both the words and policy of the Act would be bad, and if so any assignment so long as it remains revocable by the assignor cannot defeat a creditor proceeding under a trustee process. And this seems in accordance with the doctrine held by the Courts of Massachusetts and Maine on similar Acts. Mr. Angell in his Treatise on Assignments 173, says, "The Courts of Massachusetts have considered that the establishment of a trust estate for the benefit of creditors not expressly assenting thereto, is contrary to their local policy. It is viewed as a naked trust, which however good at law has been deemed from the defect of a Court invested with Chancery powers and from the nature of the attachment laws of that State utterly void as regards attaching creditors."

In a late case in Maine the Court says, that by the decisions of Massachusetts prior to the separation and the

practice of both States since, so far as they were informed the rights of an attaching creditor have been preferred to those creditors who had not actually assented prior to the attachment.

In *Quincy v. Hall* (1) it was held that an assignment by bill of sale, where the trustee merely gave his promissory note to the debtor without any indorser or other security, or any agreement to perform the trust, and some of the creditors assented to the assignment verbally and others not at all, was void against an attaching creditor.

In this case the affidavit states that the creditors assented with the exception of Cushing & Clapp, but it does not appear that they assented before the attachment, or in what manner the attachment was made, not that we mean to hold that the assent must be in writing, but the acts which are supposed to constitute the assent should be stated that the Court may judge of their effect. Whether such express assent of the creditors is necessary to defeat an attachment when the subject matter assigned is a chattel or other thing, the legal title to which by the deed or delivery vests in the trustee, we are not now called on to decide.

But on both grounds we think the present rule must be discharged.

(1) 1 Pick. (18 Mass.) 357.

MALCOLM MCKINNON V. HUGH MCKINNON.

Ejectment—Escrow—Estoppel by acts.

The *locus* had been granted to plaintiff, whose father agreed to give him a deed of property called the S. place, provided plaintiff would convey the *locus* to his sister, the defendant's wife. The father, to secure performance of this agreement, gave the deed of the S. place to his wife, as an escrow, to be delivered to the plaintiff on his conveying the *locus* to his sister. A deed from plaintiff to his father had been prepared but not executed in the father's lifetime. After the father's death, plaintiff obtained the deed of the S. place from his mother, at the same time executing and delivering to her the deed to his father, (then dead) on the understanding that in pursuance of his agreement with his father, he thereby resigned his title to the *locus* to his sister. The jury found a verdict for the defendant, and on the argument upon a rule nisi for a new trial, the only question undisposed of was whether the plaintiff was estopped by his own acts, from treating defendant as a trespasser.

Held, (Peters J.) that plaintiff was estopped.

Rule nisi for a new trial on the grounds stated in the judgment.

1st November, 1851.

Mr. Charles Palmer, shows cause.

Mr. Edward Palmer, *contra*.

Cur. ad. vult.

24th January, 1852.

PETERS J. The only point in this case not disposed of during the argument was, whether the plaintiff by his acts was estopped from treating the defendant as a trespasser.

It appeared that the *locus in quo* had been granted to the plaintiff while young, and when he resided with his father, who had occupied the lot. Indeed, from the evidence it would appear that the grant had been taken out by the father in the plaintiff's name, to avoid some official regulations which prevented more than a certain quantity of land being granted to one individual. But

plaintiff had, at several times, exercised acts of ownership sufficient to prevent the Statute of Limitations operating against him; there would, therefore, be no doubt of his right to recover in this action if he is not estopped by his subsequent acts.

It appeared from the evidence that Hugh McKinnon, deceased, (plaintiff's father) in making a disposition of his property amongst his children, had agreed with plaintiff to give him a deed of a piece of land called the Sherman place, on which plaintiff resided, but the title to which still remained in the father, provided he would make over his right to the *locus in quo* to plaintiff's sister (the defendant's wife). It further appeared that the father, to secure performance of the plaintiff's promise to make over the *locus in quo* to his sister, some short time before his death delivered the conveyance of the Sherman place to his wife (plaintiff's mother) as an escrow to be delivered to the plaintiff on his making over the *locus in quo* to his sister. The testimony of Angus McKinnon on this point was as follows;—"I occupied the lot in question with the rest of the cultivated land for twenty-two years after my father's death, I thought it was my sister's, (defendant's wife) because one day I was present when my father spoke to the plaintiff about making the swap for Sherman's place, Malcolm said he would do it. My father said, "didn't I tell you so?" (it appeared that some of the family had expressed a doubt to the old man whether the plaintiff would perform his promise to exchange after he got the deed). "Father then said, well when you sign the deed of the lot, here is the deed of Sherman's place, and he then gave the deed to his wife (plaintiff's mother) and told her not to give it to the plaintiff till he signed the other, as the Sherman place was as good to her as the lot," and this testimony was confirmed by other evidence. The plaintiff, after the father's death, being about to sell the Sherman place, required the deed. It appeared that a deed of the *locus*

in quo, from plaintiff to his father, had been prepared during his life but not executed, and now (after the father's death) plaintiff executed the deed, but the description of the grantee was not altered so as to apply to Hugh McKinnon the defendant, so that the deed on its face purported to be a deed to Hugh McKinnon, deceased, and he delivered this deed to his mother as a transfer of his right to the *locus in quo*.

I told the jury that the deed of 1820 being made to a person then dead passed nothing, but if they found plaintiff and his father had agreed to the exchange, and that the father had given the deed to the plaintiff's mother to hold till he made over his right to the *locus in quo* to his sister, as stated, and that the plaintiff had afterwards, on delivering the deed of 1820 to his mother, obtained the deed of the Sherman place from his mother, on the understanding that he thereby resigned his title to the *locus in quo* to his sister, (the defendant's wife) in pursuance of the agreement made with his father he was now estopped from treating the defendant as a trespasser.

It is unnecessary to notice all the authorities cited on the argument. The principle laid down in *Pickard v. Sears* (1) and confirmed by *Freeman v. Cooke* (2) is, that where one by his conduct wilfully causes another to believe in the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is estopped from averring against the latter a different state of things; here the plaintiff leads his mother to believe that he relinquishes his right to the *locus in quo* to his sister in pursuance of the agreement made with his father, and in that belief she gives up to him the deed of the Sherman place, which plaintiff's father had directed her to hold until the plaintiff made over his right to the *locus in quo* to his sister. He therefore clearly induces his mother to act so

(1) 6 Ad. & El. 469. (2) 2 Ex. 654. S. C. 12 Jur. 777.
18 L. J. Ex. 114.

as to alter the position of his sister, (the defendant's wife) by entirely destroying the interest she as one of the heirs had in the Sherman place. The deed though it passes no title, is good evidence of the plaintiff's professed intention at the time to divest himself of his right to the *locus in quo*, and coupled with the other evidence shows that he induced his mother to act on the belief that he then and there made over his right to his sister. We think after this he is estopped from treating the defendant as a trespasser.

At the time of executing the deed something was said as to whether it made any difference that the Hugh McKinnon named in the deed, was the father, and not Hugh McKinnon the defendant, and plaintiff replied, "if it made any difference he had a Hugh McKinnon himself, his own son." Much argument was raised on this, to show that the plaintiff by this expression evinced that he did not intend to divest himself of his interest, and undoubtedly if he had shown that, he would not be estopped, because then the mother could not be considered as acting in the belief that his title to the *locus in quo* was relinquished; whether this expression manifested any such intention was left to the jury, and they must have found that it did not show that the plaintiff then considered, or wished others to consider, the transfer void, and we think they have drawn a correct conclusion. The expression makes against this idea instead of supporting it, for it shows that the plaintiff must have thought the deed sufficient to pass his interest, else how could it confer it on his son, and if it was considered sufficient to transfer the title to his son Hugh, why should he or others think it insufficient to pass the title to Hugh the defendant, who, under the agreement with plaintiff's father was the person entitled to it.

It was also urged that the transaction took place with the mother, that defendant's wife was not a party but a stranger to it, and that as estoppels only bind parties and

privies, the plaintiff is not estopped as against the defendant. The position that estoppels only bind parties and privies is no doubt correct. But here Mrs. McKinnon, the mother, held the deed of the Sherman place as an escrow. She was the agent of the plaintiff and his sister. She was from her position the person to determine when the plaintiff fulfilled the condition entitling him to receive the deed of the Sherman place, and the transaction, between him and the plaintiff with respect to it, appears to us as strong as if the sister had been present and assented to the giving it up on receiving the defective conveyance of the *locus in quo*. To hold otherwise would be to defeat justice, by setting up one of the technical doctrines of estoppel, which the Courts at the present day as stated by Mr. Smith in his *Leading Cases*, 459, incline against. He says, "the truth is that the Courts have been, for some time favorable to the utility of the doctrine of estoppel, hostile to its technicality. Perceiving how essential it is to the quick and easy transaction of business, that one man should be able to put faith in the conduct and representations of his fellow, they have inclined to hold such conduct and such representations binding in cases where a mischief or injustice would be caused by treating their effect as revocable. At the same time, they have been unwilling to allow men to be entrapped by formal statements and admissions, which were perhaps looked upon as unimportant when made, and by which no one ever was deceived or intended to alter his position. Such estoppels are still, as formerly, considered odious."

Rule discharged.

MITCHELL V. HARVIE.

Escape—Lieutenant Governor may pardon prisoner, but his mere order to discharge would not justify jailor in permitting an escape—Plaintiff must prove damage—Non-suit.

This was an action against H. keeper of Queen's County Jail for an escape. W. was committed for trial on a charge of stealing plaintiff's watch. The defendant discharged him under an order from the Lieutenant Governor, but there was no pardon. The questions raised were: (1) Did the Lieutenant Governor's order justify the defendant. (2) If not, would an action lie at the suit of a private person, the committal being for a criminal offence. (3) If so, must plaintiff prove the watch was taken by the prisoner, before he could recover.

Held, (Peters J.) that the Lieutenant Governor had no power to discharge the prisoner and that his order would not justify the jailor.

2. That the action would lie against the jailor.
3. That plaintiff must prove his watch had been taken by the prisoner, and not having done so must be non-suited.

This action was tried 9th January, 1852, and a special case submitted for decision of the Court.

24th January, 1852.

Mr. Charles Palmer, for plaintiff.

Mr. Edward Palmer, follows.

The Solicitor-General for defendant, the Attorney-General follows.

Cur. ad. vult.

4th May, 1852.

PETERS J. This was a summary action on the case against the defendant as keeper of Queen's County Jail for an escape.

From the facts admitted by the counsel on both sides, it appeared that one Alexander White, a private in the 38th Regiment, was charged by the plaintiff with stealing his watch, that he was taken before a magistrate, examined, and duly committed for trial on the twelfth June, 1851, that before the sitting of the Court at which

he could have been indicted, the defendant discharged the prisoner under the following order from the Lieutenant Governor :

GOVERNMENT HOUSE, P. E. I.,
19th June, 1851.

TO THE SHERIFF,
for Queen's County.

SIR ;—You are hereby authorized to deliver over to his commanding officer, Capt. Leckie of Her Majesty's 38th Regiment, Alexander White, a private in that corps, who is presently confined in the jail of Charlottetown, on a charge of theft, and also of an assault.

A. BANNERMAN,
Lieut. Governor.

The prisoner left the Island before Trinity Term, so that the plaintiff could not prosecute him. At Trinity Term the Grand Jury made the following presentment :

“That on the 10th day of June, instant, one Alexander White, a soldier of the 38th regiment, in Charlottetown, entered the house of Gerald Mitchell, of Charlottetown common, and did steal and carry away a silver watch, valued at £6, currency, the property of the said Gerald Mitchell, and the jurors further present that the said Alexander White was committed to jail by Theophilus Desbrisay, John Morris and John B. Cox, three of Her Majesty's justices of the peace for Queen's County, in order that the said Alexander White should be tried for the said offence at the Supreme Court to be held on the last Tuesday in June, aforesaid, and further, the jurors present that the jailor of the said County in whose custody the said Alexander White was placed by virtue of the commitment from the three justices aforesaid, did discharge and liberate the said Alexander White, and that he cannot now be found to answer the charge preferred against him.”

The plaintiff had lost the watch, but it was not found on the prisoner, nor had the defendant ever had it in his possession or seen it. The value of the watch was found to be about £6. With the exception of the commitment by the magistrates no evidence was given to show that the prisoner had taken the watch.

Three questions were raised on the argument :

First.—Whether the order of the Lieutenant Governor justified the defendant in discharging the prisoner?

Secondly.—Even if it did not, the committal being for a criminal offence, whether an action would lie against the jailor at the suit of a private person for an escape?

Thirdly.—That supposing the action would lie, whether the plaintiff must prove that the watch was taken by the prisoner before he could recover.

As to the first point, it was argued by the Attorney General, that the Governor has power to pardon and might therefore legally discharge the prisoner. There is no doubt that the Governor may pardon and the pardon may be before as well as after conviction. Thus in 5 Com. Dig. 172 it is laid down, “The King may pardon any crime or offence before attainder or conviction,” and this he may do though the prosecution be carried on by a private person, unless the prosecutor has an interest in the judgment. *Hall's case* (1) “Alice Cooke libeled Hall in the Spiritual Court for calling her a whore and had judgment, from which the defendant appealed, and then obtained the King's pardon, and it was resolved, 1st, that all cases depending in the Spiritual Court between party and party where the suit is only *pro salute animæ vel reformatione morum*, as for defamation or laying violent hands on a clerk or the like, there the King's pardon is a bar of the suit, for the suit is not to recover any damages or any other thing, but only to inflict punishment on the offender *pro salute animæ*, which punishment the King

(1) 5 Rep. 51.

may pardon as well before as after the suit began, for in truth, such suits are only for the King, although they be prosecuted by the party, and like suits in the Star Chamber preferred by one subject against another, the King may pardon them, for although a subject prosecutes them, yet the suits are for the King and to punish the defendants for their offences and misdemeanors by fine and imprisonment, etc., to the King. But if one libels for tithes, or a contract of matrimony, or for a legacy, or the like, where the plaintiff hath an interest and property in the thing in demand and sentence shall be given for him for the thing which he libels for, there the King cannot pardon it, neither before nor after the suit begun."

But the order in this case is not and does not purport to be a pardon. A pardon must be under the great seal. If pleaded this document would be no defence to an indictment for the offence mentioned in it. The question is, therefore, whether the Lieutenant Governor has power to order the discharge of unpardoned criminals from prison before trial. And in considering this question, he may be assumed to possess the same power as the Sovereign in this respect.

In 1 Bac. Abr. 615, it is laid down, "A person legally committed for a crime certainly appearing to have been done by some one or other, cannot be lawfully discharged by any other but the King till he be acquitted on his trial, or an *ignoramus* found by the Grand Jury, or none to prosecute him on proclamation for that purpose by the justices of gaol delivery." But though it is said a person committed may be discharged by the King, it does not follow that an order for his discharge under the King's signature would be sufficient. Although justice is administered in the name of the Sovereign it is beneath his dignity to attend to the details of its administration. Many acts done in the King's name, and by his authority, can only legally be done by those to whom their

execution is entrusted, and who are themselves liable for abuse of their powers. In the *King v. Brown* (1) cited in the preface to Foster's Rep. 12 and 2 Bac. Abr. 23, the defendant was brought up on *Habeas Corpus*. "It appeared the King had requested some of his ministry to commit the defendant to jail, but they not having evidence of the defendant's guilt refused to grant any warrant; upon which His Majesty, thinking the defendant guilty, called for a warrant which he signed with his own hand, by which the defendant was committed to the custody of the messenger, and the warrant being taken notice of by the Court of B. R., and the whole matter being considered the Court gave their opinion that the defendant should be discharged, because the warrant was under the King's own hand, and not under the hand of any secretary or officer of state or justice of the peace. And the reason given for this hath been that the King having given all his executive powers to his judges and justices of the peace, there is none left in him, the executive power being too mean and troublesome for His Majesty, and if the King erred ever so much there is no remedy against him, but there is a remedy at law against any subject whatsoever." Here though the party might legally be committed in the name and by the authority of the King, yet the warrant for his committal signed by the King was held void. But the precise point now before the Court is noticed in 1 Burns Jus. 519, where after citing the authority already quoted from Bac. Abr., that a person legally committed for a crime cannot (until acquittal or bill ignored) be legally discharged by any other than the King. He adds in a note, "that is by some one of the King's Courts, or by some magistrate duly authorized." If the prisoner in this case was improperly committed he might have caused himself to be brought before the judge on *Habeas Corpus*. The prosecutor and committing magistrate would then (according

(1) 2 Show. 471. Case 437.

to the practice) both have had notice so that they might appear and resist his discharge, and the judge after due inquiry into the circumstances, and hearing both sides, if satisfied that there was no reasonable pretence for imputing to the prisoner the offence, would have discharged him or admitted him to bail. It appears to me, therefore, that the Lieutenant Governor had no power to discharge the prisoner, and that the order does not justify the defendant in having permitted him to escape.

As to the second question. The rule of law, founded on a statutory principle of public policy and designed to stimulate the prosecution of offences, is that where a criminal offence has been committed which is also the subject of a civil action, the party injured shall not be allowed to sue for the civil injury until he has first prosecuted the offender by indictment for the criminal offence. The law on this subject was very fully laid down in the late case of *White v. Spettigue* (1). The party injured being thus compelled to postpone his action to recover the value of the property taken from him, until he has prosecuted for the criminal offence, any omission or neglect of duty by those who are bound to assist the prosecutor in carrying on the prosecution, which impedes it and thereby necessarily delays him in bringing his civil action is an injury to him, for which an action on the case lies against the party guilty of such neglect of duty. In Buller N. P. 64, it is laid down, "If my servant be robbed and he go to a justice of the peace and pray to be examined touching the robbery, and the justice refuse to examine him, so that I am thereby damnified and cannot proceed against the hundred, I may have an action against the justice." The same principle seems applicable to the case of a jailor, who by allowing a prisoner to escape, hinders the prosecutor from pro-

(1) 13 M. & W. 603. S. C, 9 Jur. 70. 14 L. J. Ex 99.

ceeding with the criminal charge, and thereby prevents his bringing a civil action against him.

The last question then arises, viz., whether the plaintiff must prove the taking of the watch by the prisoner, before he can maintain this action. This was properly likened in some respects, on the argument, to escape on mesne process, where if the prisoner escape at any time after the return of the writ, the sheriff is liable, but he is only liable for such damage as the plaintiff has actually sustained; and if in consequence of such escape, the plaintiff be delayed for the shortest time in the prosecution of his suit, it is a damage in law sufficient to sustain the action. Thus in *Williams v. Mostyn*, (1) relied on in the argument, where the party arrested on mesne process escaped after the return of the writ, the plaintiff had sustained no actual damage, nor been delayed in his suit, and it was held the action would not lie. Parke, B. says, "there would, we think, be no doubt that if the plaintiff had sued out his writ of *Habeas Corpus* during the defendant's absence from prison, and been prevented from executing it, or had offered to deliver a copy of the declaration during such absence, and had been prevented by the absence from doing so, he would have been delayed, and delay of suit never so short is necessarily a damage." I agree to the distinction taken by the plaintiff's counsel between that case and the present. Thus in *Williams v. Mostyn*, (1) the plaintiff only had a right to have his debtor in custody whenever he chose to remove or declare against him, and if when he did so, he was in custody he could not be delayed; but that in this case the plaintiff by the escape has an actual impediment thrown in his way which prevents his suing at all until the criminal case is first disposed of. But this would only show that in this case it was not necessary for the plaintiff to issue a writ against the prisoner, before

(1) 4 M. & W. 145 S. C. 2 Jur. 645.

bringing the action for the escape. The argument does not bear on the real question raised and now under consideration, which is not whether the plaintiff has been delayed in commencing his suit against the prisoner (which appears plain enough), but whether admitting that to be the case it was not necessary to prove that he had a good cause of action against him, which in this case could only have existed by its appearing that he was the taker of the watch.

In all actions for escape on mesne process it must be stated in the declaration and proved that the plaintiff had a cause of action against the party arrested. In *Alexander v. Macaulay*, (1) the declaration stated that the plaintiff had a good cause of action against his creditor, that he arrested him and that defendant suffered him to escape. At the trial the plaintiff was nonsuited because he could not prove any debt against the prisoner who had escaped. In this case the plaintiff must have been delayed in his suit, because his creditor having escaped entirely, he could not have him to declare against at the return of the writ, but as his being unable to prove any debt against the prisoner showed that the action against him, if he had not escaped, would have failed, he could not therefore be damnified by the escape, and consequently, had no cause of action against the jailor. And in the note to *Benson v. Welby*, (2) citing the same case it is said, "It is necessary in this action to aver and prove that the plaintiff had a cause of action against the person who escaped. If it be not averred, the declaration is bad on demurrer, and if it be not proved as averred the plaintiff will be nonsuited."

It is true the Court in *Williams v. Mostyn* (3) say, if the plaintiff had sued out a *Habeas Corpus*, or offered to deliver a copy of his declaration during the prisoner's absence, that would have been a delay sufficient to

(1) 4 T. R. 611.

(2) 2 Sand. R. 150.

(3) 4 M. & W. 145.

maintain the action ; but it is not said it was unnecessary to prove the debt against the prisoner. No such question was raised because, no doubt, the plaintiff had proved that at the trial, and the only question was, whether the escape had caused damage to the plaintiff by delaying him in the prosecution of his suit against the prisoner, in which he had shown he would have recovered. Mr. Starkie page 1043 lays down the proof necessary in such cases very clearly. "The damage resulting to the plaintiff, that is, either that the plaintiff has been delayed in recovering his debt, or that he lost it or is likely to lose it. For this purpose he must prove the original debt as averred in the declaration, with the same degree of particularity, as it seems and no more, than would have been requisite in the original action against the debtor himself." So in an American case *Riggs et al v. Thatcher*, (1) it is said, "The action cannot be maintained unless the plaintiff had a valid subsisting cause of action against the person escaped."

From these authorities it is clear that in all actions for escape, the plaintiff must prove, first, the debt against the prisoner ; second, the escape ; third, that he had been damaged by it, and if he fail in any one of these requisites, he will fail in his suit. And I can see no distinction in principle between the proof necessary in such cases and the present.

It was urged by the plaintiff's counsel that the plaintiff had a right to bring his action against the prisoner, and that as the escape necessarily delayed the bringing his action, his right had been injured, which entitled him to damages at law, and the dictum of Powell J. that the possibility of damage is sufficient, cited in 2 Starkie on Evidence 364, was relied on. But if the plaintiff could not recover in an action against the person escaped, he could not possibly be injured by the escape, as its only

(1) 1 Greenleaf, 68.

effect would be to prevent his going on in a suit in which he would be unsuccessful.

But it is a mistake to suppose that the doctrine that a mere injury to a right, where no actual damage has been sustained, applies to such cases as this. In all actions on the case damages are the gist of the action, and they must actually have occurred or an action will not lie. They may be very trifling, they may be only nominal, but still they must have occurred. The person who arrests his debtor has a right to have him in prison at the return of the writ to declare against, but unless he shows that he actually offered to deliver a declaration in his absence, he cannot maintain an action for the escape, because he has not actually been delayed one moment in taking any step towards the prosecution of his suit. But if he has offered to deliver a declaration in the defendant's absence, although the prisoner be there ten minutes afterwards so that the declaration could then be served, yet there has been actual delay for which (and not for any injury to the abstract right) the law gives him nominal damages.

It is true there are cases where mere injury to an abstract right will be sufficient to maintain an action, such as surcharging commons ; diversion of water courses, etc., but those cases are necessary exceptions to a general rule, because in such cases unless an action would lie to preserve the right, its repeated infringement might, in the end, ripen into a title in the intruder, or be used as evidences to bar the right of the party legally entitled to it.

There being no evidence in this case that the watch was taken by White, the plaintiff must be nonsuited.

IN THE MATTER OF MARTIN BRENNAN.

Michaelmas Term, 1852.

*Support of poor relations—Son-in-law not liable under 14 Vic.,
Cap 7, to support wife's father.*

PETERS J. This is an application to set aside an order of justices of the peace, made under the Act 14 Vic., Cap 7, for compelling persons to support their poor relations. The objection is that the order is made against a son-in-law, who it is contended is not liable under the Act. The statute only provides for the support of natural parents. It does not oblige the maintenance of any relative who is out of the line of consanguinity. The son-in-law is therefore not liable to support his wife's father.

The rule for setting aside the justices' order in this case must therefore be made absolute.

WHITE V. WHITE.

Action by son for wages—No express agreement—Circumstances showing some remuneration intended, though amount to be fixed by father.

The defendant's sons had worked in his shipyard after coming of age. There had been no express agreement for wages, but defendant had given them what he thought right as they left him, and when plaintiff left, the defendant offered him land worth over £100, which plaintiff refused. The plaintiff then sued his father for wages and the jury found a verdict for £100. The defendant, on a rule for a new trial, contended that plaintiff must prove an express agreement to pay wages, or not having done so could not recover.

Held, (Peters J.) that the circumstances rebutted the presumption that the services were gratuitous and showed clearly that some recompense was intended, and that plaintiff was entitled to recover the amount found by the jury.

28th October, 1852.

Mr. Edward Palmer, on 16th July last took out a rule nisi for a new trial, which now came on for argument,

Mr. Charles Palmer, showed cause.

Mr. Edward Palmer, *contra*.

Cur. ad. vult.

1st November, 1852.

The judgment of the Court was delivered by Mr. Justice Peters.

PETERS J. This was an action brought by the plaintiff against his father, the defendant, for wages. Defendant is a shipbuilder, and has several sons, most of whom learnt their trade with him, and who after coming of age, continued to live and work with him in his yard as before. No express agreement for wages was made with any of them; as the sons left his employ he gave them what he thought right for the time they had served. The plaintiff left in 1848. The defendant offered him a piece of land worth between £100 and £200, which the plaintiff refused to accept, and he now brings his action.

For the defendant it was contended, that as this was a transaction between father and son, to entitle the plaintiff to recover, it was necessary to prove an express agreement to pay wages, and that having failed to do so, the plaintiff must be nonsuited. I left the case to the jury, reserving leave to move to enter a nonsuit. The jury found for the plaintiff £100.

The question for the Court now is, whether a son continuing to live with his father after his majority, and working for him in the same manner as before, can maintain an action the same as a stranger.

In ordinary cases, between strangers, proof of service is evidence from which an agreement to pay is presumed. But when a child continues to reside with his parent after his majority, the presumption is, that the service was gratuitous, unless an express agreement, or circumstances which show an understanding between both parties to the contrary be proved. That such is the rule appears clearly from the cases of the *King v. the Inhabitants of Stokely*, (1) the *King v. the Inhabitants of Sow*, (2) and *Andrews v. Foster* (3).

It was contended for the plaintiff that the circumstances of this case show that he was to have wages like another workman. The evidence of James McEachern must be laid out of the question, as it related to a conversation with the defendant some years before the plaintiff came of age, as must also the evidence of Ewen McMullen which relates to what defendant said he had allowed John and James. The plaintiff's case must, therefore, rest on the evidence of James and William White. William White expressly says he had no agreement with his father, and from the evidence of both it appears that there was no agreement between the defendant and his sons, but that they had expected he would make them an allowance on leaving, and he accordingly did so to each.

(1) 6 T. R. 757.

(2) 1 B. & Ald. 178.

(3) 1 Vermont R., 556.

This evidence did not appear to me sufficient to establish an agreement, that the defendant should pay the plaintiff, wages in the same manner as he would have been liable to pay a stranger. But it was contended that whether it was so or not, was a question for the jury and not for the Court.

It is laid down by Mr. Starkie p. 543, "That mere preponderance of evidence, such as would induce a jury to incline to one side rather than the other, is frequently insufficient. It would be so in all cases where it fell short of fully disproving a legal right once admitted or established, or of rebutting a presumption of law." Now it is only from the dealings between the father and his other sons who continue to reside with him in the same way as the plaintiff did, that an agreement to pay him wages like a stranger can be presumed. But the other sons had no express agreement for wages, and from their evidence it does not appear that when they left, any mutual accounts were made up between them and the father, though they must have received money and other things from him during the time they remained with him. And when they left the defendant gave them in money or land, what he thought right. It appears to me, too much to say that from such evidence a jury could infer an agreement for wages, in the same way as if the plaintiff were a stranger.

But on the other hand the evidence seems to me sufficient to rebut the presumption of gratuitous service. This is very different from the case put by the defendant's counsel of a farmer's son remaining with his father. Here the nature of the business is such, that one competent to perform it must be entitled to very considerable remuneration beyond his mere maintenance. The time he continued to work (upwards of two years) after he came of age, the fact of the defendant giving a recompense to his other sons, though the amount was fixed by himself,

and of his offering recompense to the plaintiff on his leaving; these circumstances show clearly that though there was no agreement between them for wages, both parties intended that the services were not to be gratuitous, but that some recompense was expected the amount of which was to be fixed by the defendant.

The question then arises whether, where a person agrees to accept such remuneration as his employer thinks fit to give him, an action will lie if he is dissatisfied with the amount offered. In *Taylor v. Brewer*, (1) the plaintiff performed work for a committee under a resolution entered into by them "that any service to be rendered by him should be taken into consideration, and such remuneration made as should be deemed right." It was held that an action could not be maintained, the resolution importing that the committee were to judge whether any remuneration was earned.

But in *Jewry v. Busk*, (2) where the defendant requested the plaintiff to show the defendant's house for him, and the defendant would make him a handsome present, and subsequently gave him £2; on the trial Mansfield C. J. directed the jury that this was no evidence of any contract, but that it must be inferred that plaintiff intended to trust entirely to the defendant's generosity, and must therefore, be content with what the defendant chose to give him, but the jury notwithstanding, found for the plaintiff. A rule to set aside the verdict was refused, the Court being of opinion that there was sufficient evidence of a contract to do work and labor for a reasonable recompense, the amount of which it was the province of the jury to establish. And see *Bryant v. Flight* (3).

And in *Bird v. McGahey*, (4) where a verbal agreement had been made by the guardians of a public board with the plaintiff, a surgeon, to attend the sick at an

(1) 1 M. & S. 290.

(2) 5 Taunt. 302.

(3) 5 M. & W. 111.

(4) 2 C. & K. 707.

infirmary, the plaintiff was to receive whatever remuneration the board of guardians should think right and proper. The board offered plaintiff £50 which he refused, and brought his action. It was contended by the defendant's counsel that the plaintiff could not recover, and *Taylor v. Brewer* (1) was relied on. Maule J. says, "This case is distinguishable from that of *Taylor v. Brewer* (1) in which the plaintiff proceeded on the contract made by a written resolution; here there was no formal written contract but a verbal agreement. I will leave it to the jury to say what the board, acting *bona fide*, ought to have awarded."

These last cases seem to establish that, in a case like the present, an action will lie to recover a reasonable recompense, although by the understanding its amount was to be fixed by the employer.

In the present case the plaintiff would have acted wisely in accepting the defendant's offer, as the jury have given him less than the defendant offered him.

The rule must be discharged.

(1) 1 M. & S. 290.

TRUSTEES OF ST. ANDREW'S COLLEGE V. GRIFFIN
AND OTHERS.

Trespass quare clausum fregit—Parol demise by corporation void.

This was an action of trespass. The plaintiffs had demised by parol for one year, the land to F. and put him in possession. Shortly afterwards defendants entered, turned him out and retained possession. On the trial it was contended that F. being tenant in possession the action should have been brought in his name and not in that of the plaintiffs, and the plaintiffs were non-suited. In support of a rule to set this non-suit aside it was contended that the corporation could only demise under seal and the parol demise to F. was therefore void and the corporation properly made plaintiffs.

Held, (Peters J.) that the demise was void and the non-suit must be set aside.

This cause was tried 6th July, 1852, and the plaintiff non-suited. A rule was taken out to set aside this non-suit.

1st November, 1852.

Mr. Charles Palmer, shows cause.

The Solicitor-General follows.

Mr. Edward Palmer, *contra*.

Cur. ad. vult.

4th January, 1853.

PETERS J. This was an action of trespass *quare clausum fregit*, by the plaintiffs as a corporation. It appeared that Brenan the secretary of the corporation, and Thornton, both trustees, had leased the premises by parol to one Ferguson for one year and put him in possession. That a day or two afterwards the defendants entered and turned him out and retained possession. It was objected that Ferguson being tenant and in possession, the action should have been brought in his name and the plaintiff must, therefore, be non-suited.

The counsel for the plaintiff, in reply to the motion for a non-suit, treated the demise to Ferguson as valid.

The arguments of counsel on both sides attracted my attention to other points. The answer now given did not suggest itself either to the plaintiffs' counsel or to the Court. If it had I should have allowed the case to go to the jury.

The answer to the motion for a non-suit now made is, that the plaintiffs being a corporation could only demise by seal, and the parol demise to Ferguson was void.

The question therefore, for the consideration of the Court is, whether a demise by a corporation, of lands, without seal is valid?

The general rule of law is, that a corporation must contract under their corporate seal. But to this rule there are several exceptions, within which the defendants contend this case falls, and they rely strongly on the doctrine laid down in 2 Kent's Com. (1) and the *Bank of Columbia v. Patterson*, (2) that whenever a corporation aggregate was acting within the range of the legitimate purpose of its institution, all parol contracts made by its authorized agents are express and binding promises on the corporation. But the American decisions as stated by Patteson J. in delivering the judgment of the Court in *Beverly v. The Lincoln Gas Company*, (3) have almost entirely done away with the rule, that a corporation can only speak and act by its common seal. The English law on this subject and the principles on which it rests, have been fully discussed in the recent cases of *Church v. The Imperial Gas Company*, (4) *Corporation of Ludlow v. Charlton*, (5) *Lamprell v. The Bellicary Union* (6) and *Diggle v. The Blackwall Railway Company* (7). In the latter case Alderson B. says, "the general rule no doubt is, that corporations must contract

(1) 289.

(2) 7 Cranch 299.

(3) 6 Ad. & El. 829: S. C. 2 N. & P. 283.

(4) 6 Ad. & El. 846, S. C. 3 N. & P. 35.

(5) 4 Jur. 657, S. C. 6 M. & W. 815, 8. C. & P. 242.

(6) 18 L. J. Ex. 282, S. C. 3 Ex. 283.

(7) 14 Jur. 937, S. C. 6 Ry. Cas. 590; 6 Ex. 442: 19 L. J. Ex. 308.

under their corporate seal, that being the only way by which the governing body of a corporation can properly express the mind of the corporation. But to this rule there are some exceptions, all of which I think may be classed under one of two heads. First, when the acts done are such as the corporation, by its constitution, is appointed to do, as in the case of trading corporations, part of whose duty, by their very appointment, being to draw bills of exchange, they may do it without affixing the common seal. Secondly, when the acts are required for convenient management and comfort, as in the cases which have been cited from Com. Dig., "Franchise," F. 13, *i. e.* where either the acts are trivial in their nature, or of frequent occurrence, so that the doing them in the usual way would be inconvenient or absurd, or such, that an overruling necessity requires them to be done at once, or not at all—here also, the corporation may proceed by parol instead of affixing the seal according to the proper and regular course." In the present case what was done by parol might, with equal facility, have been done under the corporate seal. The demise made by Brenan and Thornton to Ferguson was therefore void, and the corporation are, therefore, properly made plaintiffs.

The case of *Doe dem Pennington & others v. Taniere*, (1) does not in the least impugn the rule laid down in the cases I have referred to. That case merely decided that the receipt of rent by a corporation, raised a presumption against them, that they had demised in such a manner as to bind them whether by deed or otherwise. No such presumption can arise in this case, as Ferguson was evicted a day or two after he entered. The plaintiffs never received any rent nor did anything occur which can be construed into a recognition of him as tenant, or as an adoption of the act of Brenan and Thornton.

The rule for setting aside the non-suit must therefore, be absolute.

(1) 13 Jur. 119 : S. C. 12 Q. B. 988 ; 18 L. J. Q. B. 49.

DOE DEM COLVILLE AND OTHERS V. MARTIN.

Ejectment—Statute of Limitations—Tenancy at will converted into tenancy at sufferance—Construction of statute.

The defendant was a tenant at will until 1834, when his tenancy was determined by a demand of possession and became a tenancy at sufferance. The Statute of Limitations was passed in 1837, and the question arose on the construction of the statute, as to whether a tenancy at will created and converted into a tenancy at sufferance before the passing of the act would be a bar under it, provided the tenancy at will and the tenancy at sufferance taken together have continued for 21 years, without payment of rent or acknowledgment of title.

Held, (Peters J.) that such tenancies, taken together would be a bar.

This cause was tried in January, 1852, and the jury found a verdict for defendant. A rule nisi was then taken out for a new trial.

15th July, 1852.

Mr. Charles Palmer, showed cause.

Mr. Edward Palmer, *contra*.

Cur. ad. vult.

4th January, 1853.

PETERS J. This was an action of ejectment tried before me in January 1851. A verdict was found for the defendant, but several important questions were raised at the trial, on which a rule nisi for a new trial was granted.

First, It was contended that the lessors of the plaintiff were barred by the Statute of Limitations, 7 Wm. 4, cap. 30. On the part of the defendant evidence was offered to show that, as to a part of the *locus in quo*, he had, by cutting down and clearing for more than 20 years, obtained a *possessio pedis*, and to show the lessor of the plaintiff out of possession of the residue he entered into evidence to show that about 1812, or 1816, one Donald Nicholson had entered into possession under an agreement for purchase, made with one Johnston, the agent of the lessors of the plaintiff; that Nicholson continued to

exercise acts of ownership over it until 1819, when he left the Island, leaving his brother, John Nicholson, to look after it. who died in 1822, Donald Nicholson having previously died abroad in 1821 ; that shortly after Donald Nicholson's leaving the Island, one Samuel Martin to whom he was indebted, attached Nicholson's property and obtained judgment, under color of which he entered into possession of the *locus in quo*, and that one Alexander McLean, (a nephew of Nicholson's and who also administered to his estate) in 1829, bought from Martin and had ever since continued in possession. No direct evidence of an agreement for sale to Nicholson was given, but a great deal of circumstantial evidence was offered to establish the fact, and the land being in a wilderness state the evidence of Nicholson and McLean's possession consisted in cutting wood and exercising various acts of ownership over it, and a great number of witnesses were called on both sides, those on the one side tending to show that Nicholson and McLean were in possession, and those on the other, that one McLeod, as the agent of, or acting under the plaintiffs, held possession. I told the jury that if Nicholson entered under an agreement to purchase, and he and McLean continue in possession under it, it would show the lessors of the plaintiff out of possession, and they would be barred by the statute. The jury found for the defendant, and in considering the questions raised at the trial, Nicholson and McLean must be assumed to have had possession, as contended for by the defendant.

In 1834, Mr. Douse, the agent of the lessors of the plaintiff served McLean with a paper containing a demand of possession, and a short time afterwards served him with a declaration in ejectment, which was not prosecuted further.

The counsel for the plaintiffs contend, that assuming Nicholson and McLean to have been in possession under

agreement to purchase, McLean was tenant at will until 1834, when his tenancy at will was determined by Douse's letter, upon which he would become tenant at sufferance, and that, therefore, as there was no existing tenancy at will, in 1837, when the statute passed, the statute only began to run from the determination of the tenancy at will in 1834.

It was also urged, on the argument, that I should have left it to the jury to say whether a new tenancy at will was not created in 1834. But if the counsel for the plaintiff had desired that question to be left to the jury, he should have said so on the trial, which he did not, and if he had, there was no evidence from which the jury could infer that a new tenancy was created.

A question of great importance on the construction of the statute is thus raised, viz: whether a tenancy at will created and converted into a tenancy at sufferance, before the passing of the act will be a bar, provided the tenancy at will and tenancy at sufferance taken together, have continued for 21 years, without payment of rent or acknowledgment of title?

The English decisions on the subject appear very conflicting. In *Doe dem Bennett v. Turner*, (1) decided in 1840, the defendant entered as tenant at will to the lessor of the plaintiff in 1817, and continued without payment of rent until 1827, when the landlord entered to cut stone, which was held a determination of the tenancy at will, after which he continued without payment of rent until 1850. The Court of Exchequer held, that if on the determination of the tenancy at will in 1827, a new tenancy at will was created, the statute would run, not from the commencement of the old, but from that of the new tenancy at will but that if on the determination of the old tenancy at will, in 1827, a tenancy at sufferance commenced and continued, so as to comprise 21 years

(1) 7 M. & W. 226; affirmed, 9 M & W. 643.

from the commencement of the old tenancy at will in 1827, the plaintiff would be barred.

In *Doe dem Evans v. Page*, (1) decided in 1844, the jury found that Mrs. Evans, after her husband's death continued to reside in the cottage as tenant at will to the lessor of the plaintiff, her son, until her death in 1832, when the defendant, not claiming under her but a mere trespasser, stepped into the cottage. The Court held the plaintiff entitled to recover. Lord Denman, in giving judgment, says, "we are of opinion that the 7th section only applies to cases of tenancies at will existing at the time the Act passed, or subsequently and it does not apply to cases where the tenancy at will had been determined before the passing of the Act." This case is urged as overruling *Bennett v. Turner* (2). There is this difference, however, between the two cases, that in *Bennett v. Turner* (2) the tenant at will continued in possession as tenant at sufferance, whereas in *Evans v. Page*, (1) the defendant never had been tenant at will, was not tenant at sufferance, but a stranger who had entered by wrong and held adversely.

Doe dem Angell v. Angell, (3) *Doe dem Dayman v. Moore*, (4) and *Doe dem Jukes v. Sumner*, (5) seem, certainly, to some extent, to recognize *Evans v. Page*, (1) but the first case turned on the 9th section, the last on the 8th, and in *Doe dem Dayman v. Moore*, (4) the tenancy at will existed at the time of the passing of the Act. The main point in *Bennett v. Turner* (2) and *Evans v. Page* (1) did not, therefore, arise.

In *Jones v. Jones*, (6) decided in 1847, Pollock C. B., in giving judgment puts the case, "that if for twenty

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| (1) 13 L. J. Q. B. 153; S. C. 5 Q. B. 767; 8 Jur. 999. | (4) 15 L. J. Q. B. 324; S. C. 9 Q. B. 555, 10 Jur. 815. |
| (2) 7 M. & W. 226, affirmed 9 M. & W. 643. | (5) 14 M. & W. 39; S. C. 9 Jur. 413; 14 L. J. Ex. 337. |
| (3) 15 L. J. Q. B. 193; S. C. 9 Q. B. 328, 10 Jur. 705. | (6) 16 M. & W. 699; S. C. 4 D. & L. 494, 11 Jur. 335; 16 L. J. Ex. 299. |

years before the Act, the land had been occupied by tenants at will, the statute would be a bar, but if the tenancy at will continued at the passing of the Act the possession would not be adverse, and the party claiming, would by the 15th section have five years to bring his action." The learned judge must evidently, have had in his mind the case of a tenancy at will determined before the passing of the Act, and it seems to me impossible to reconcile his observations with the idea that *Bennett v. Turner* (1) was not law.

In *Doe d. Goody v. Carter*, (2) decided January, 1847, the defendant's husband entered as tenant at will to his father, Robert Carter, before 1824, at which period Robert Carter obtained a conveyance of the premises of which he had before been let into possession, under an agreement to purchase. The son (defendant's husband) continued in possession up to his death in 1834, after which defendant, continued in possession to the bringing of the action, without payment of rent. In 1829, the father Robert Carter, had mortgaged the premises to the lessor of the plaintiff. Under these circumstances it was contended that the conveyance to the father in 1824, or at all events, the mortgage in 1829, determined the tenancy at will. Lord Denman in giving judgment says, "assuming this to be so, still the son would, thereby, become tenant at sufferance, and the twenty years under the Statute 3 and 4 Wm. 4 cap. 27, having begun to run long before would continue to run, unless a new tenancy at will, or for some other term were created," for which he cites *Doe dem Bennett v. Turner*, (1) and he continues, "and indeed the same observation would apply if the conveyance in 1824 were treated as a determination of the tenancy at will. Now there was no evidence in this case from which the jury could draw the conclusion that a new tenancy at will between the father

(1) 7 M. & W. 226.

(2) 12 Jur. 285; S. C. 9 Q. B. 863; 18 L.J. Q.B. 305.

and son had been created at any time within twenty years before the bringing of this action of ejectment, and therefore, the determination of the tenancy at will of the father, either in 1824 or 1829, is not, in truth, material." In this case decided three years after *Evans v. Page*,⁽¹⁾ Lord Denman not only cites *Bennett v. Turner*,⁽²⁾ without disapprobation, but determines the very point decided in that case on its authority.

In *Doe d. the Birmingham Canal Co. v. Bold*,⁽³⁾ decided in November, 1847, only ten months after *Goody v. Carter*,⁽⁴⁾ where the defendant became tenant at will to the lessor of the plaintiff in 1824, which tenancy was determined by a demand of possession in 1831, it was contended that the plaintiff was barred. The Court held he was not, and Lord Denman in giving judgment says, "it was further contended that the ejectment was barred by the Statute of Limitations but it is clear that the determination of an estate at will before that statute passed, gives a right of entry commencing at that time."

If this case is correctly reported, the decision appears to be directly contrary to that given in *Goody v. Carter*, by the same Court only ten months before. It is to be observed that though *Bennett v. Turner* and *Goody v. Carter*, were cited on the argument, no notice is taken of either case in the judgment, a circumstance which must create some suspicion, as to the accuracy of the report, as if the Court considered itself as overruling those cases, Lord Denman, in all probability, would have adverted to them, especially as he would be overruling a decision pronounced by himself only ten months before.

In *Doe dem Carter v. Barnard*,⁽⁵⁾ decided in 1849, John Carter, the husband of the lessor of the plaintiff, had eighteen years before his death, (which happened in 1834,)

(1) 13 L. J. Q. B. 153.

(2) 7 M. & W. 226.

(3) 12 Jur. 350, S. C. 11 Q. B. 127.

(4) 12 Jur. 285; S. C. 9 Q. B. 863, 18 L. J. Q. B. 305.

(5) 13 Jur. 915; S. C. 13 Q. B. 945, 18 L. J. Q. B. 306.

been let into possession by Robert Carter, his father, as tenant at will and continued in possession up to the time of his death. After John Carter's death, in 1834, the lessor of the plaintiff, his widow, had continued in possession for fourteen years. The defendant, a mortgagee, under a mortgage made in 1829, shortly before the action was brought, got into possession. The plaintiff contended that the possession of her husband for eighteen years, and her own for fourteen, entitled her to recover. The Court held that as she showed nothing to connect her possession with that of her husband, she could not recover under the 34th section. But Patteson, J. in delivering judgment says, "If the plaintiff had been defendant in an action of ejectment, no doubt the non-possession of the lessor of the plaintiff, evidenced by her husband's and her own consecutive possession for more than twenty years, would have entitled her to a verdict on the words of the 2nd section." At first it might appear from the Court saying that the 2nd section would have been a bar, had the lessor of the plaintiff been defendant, that the *dictum* of Patteson would not apply to a question on the 7th section. But the 2nd section provides that no action shall be brought but within twenty years next after the right to make an entry shall accrue and the 7th section merely points out when a right of entry against a tenant at will shall be deemed to have accrued, so as to come within the limitation prescribed by the 2nd section. In the judgment of Wilde C. J., in *Garrard v. Tuck*, (1) it seems to have been assumed on the argument of this case, that the tenancy at will continued until John Carter's death, in 1834, but the facts show that it was converted into a tenancy at sufferance by the mortgage in 1829, and the Court must have so considered it, as if John Carter had been tenant at will at his death, his estate could not (as held by the Court) have descended to his heir at law. The action was commenced in 1848, and unless Justice

(1) 13 Jur. 871; S. C. 8 C. B. 231, 18 L. J. C. P. 338.

Patteson had considered that a tenancy at sufferance could be tacked on to a previous tenancy at will, determined before the passing of the Act in 1833, I do not see how he could have thought that the plaintiff, had she been defendant, would be entitled to a verdict, there not being twenty years from the determination of the tenancy at will in 1829 to 1848.

Indeed the case shows that the plaintiff, was the defendant in *Goody v. Carter*, where, on the same state of facts, she succeeded in her defence.

Thus stand the English decisions on this point, to reconcile them all does not appear easy. But the construction given to the statute in *Bennett v. Turner* seems to me most in accordance with its intention.

The 2nd section of the statute limits the right to bring an action to twenty years after the right of entry accrues. The 5th section provides that where the party in possession is tenant at will, the right shall accrue one year after the tenancy at will commenced. The 8th and 9th sections provide that mere entry or continued claim shall not preserve the right of the owner, nor by section 11 will an acknowledgment, unless in writing, prevent its operation. These provisions seem to reflect light on the intention of the statute in cases like the present. The object seems to be to favor the actual occupier, and to discountenance neglected claims. According to all the cases, it converts the occupancy of a tenant at will, commenced twenty years before, and existing at the passing of the Act, into a means of depriving the owner of his estate. Now a tenant at sufferance is defined to be "one who enters by lawful demise, or title, and afterwards wrongfully continues in possession" (1). It would seem strange that a statute so hostile to those who have slumbered over their rights, should be intended to operate on a tenancy at will existing at its passing, and yet not

(1) Com. Dig. Tenant by Suf (1).

operate on it where it had been converted into a tenancy at sufferance; as, in the first case, the possession being permissive, there would be nothing to excite the owner's vigilance, whereas the wrongful continuance of possession in the latter case would be likely to do so.

Again, the provisions in the 8th, 9th and 11th sections manifest a strong intention to make continuous occupancy, for the period of limitation, a bar, unless accompanied by payment of rent, or acknowledgment of title. The act which converts a tenancy at will into a tenancy at sufferance, is frequently not more hostile to the possession of the occupier than the entry or claim mentioned in the 8th and 9th sections, while, though the character of the tenant's occupation is changed to a lesser one, his actual occupation continues uninterrupted. Whether where a tenancy at will has ceased before the passing of the act, and some other person a mere stranger has got into possession, the owner would be barred, may admit of doubt. The possession would not then be continuous. Such was the case in *Evans v. Page*, (1) and looked at as deciding that alone, it would not be inconsistent with *Bennett v. Turner* (2). See the observations of Pollock, C. B., in *Jones v. Jones* (3). It appears to me, therefore, that assuming the tenancy at will in this case continued until 1834, the lessors of the plaintiff would be barred by the statute.

But the tenancy at will was, in fact, determined long before. If a tenant at will grants or assigns his lease to another, it is a determination of the tenancy at will, (4) *Goody v. Carter*, (5). If therefore, the attachment by Martin had the effect of assigning D. Nicholson's interest in the *locus in quo*, it was a determination of the tenancy at will. But supposing that the proceedings under the attachment had not that effect, it was, at all

(1) 13 L. J. Q. B. 153.

(2) 7 M. & W. 226.

(3) 16 M. & W. 699.

(4) 4 Com. Dig. "Estate" (H. 6,) 61.

(5) 11 Jur. 285.

events, determined by the death of Donald Nicholson in 1831; 4 Com. Dig. 61, and *Doe d. Stanway v. Rock*, (1) where one Woolrich entered into possession of a piece of land under an agreement to purchase, and continued in possession until his death, in 1822, after which his widow continued in possession. It was held that his tenancy at will was determined by his death. So that in the present case there is more than twenty years from the determination of the tenancy at will to the bringing this action which was commenced in 1851.

But it was further contended that McLean's letter to Lord Selkirk (the *cestui que trust*) dated June 1851, is an acknowledgment which takes the case out of the statute. The letter in substance states that Nicholson had purchased; that the money was paid; that the writer stands in Nicholson's shoes and requests "that his lordship would direct his agent to execute the title deeds without further delay and trouble." This amounts only to a demand of a conveyance of the legal estate accompanied by an assertion of an equitable title in the defendant, which would entitle him in equity to an injunction against an ejectment brought to dispossess him. The acknowledgment mentioned in the 11th section must, it appears to me, amount to an admission of the plaintiff's right to the possession of the land. In *Trueloch v. Roby*, (2) where the same question arose on the 28th section of the English Act, the Vice Chancellor held the letter a sufficient acknowledgment, on the ground "that it was an admission that the plaintiff was owner of the equity of redemption, and that it did not belong to the defendant." In *Doe d. Curzon v. Edmonds*, (3) the defendant offered to accept a lease, but expressed his opinion that if contested he could establish a legal title in himself. The offer was not accepted, and the Court held the acknow-

(1) 4 M. & G. 30, S. C. 4 C. & (2) 5 Jur 1101, S. C. 15 Sim,
M. 549, 6 Jur. 266. 265.

(3) 6 M. & W. 295.

ledgment insufficient. In *Fursdon v. Clogg*, (1) where the acknowledgment was held sufficient, the letter clearly admitted the plaintiff's right to the rent, and begged for mercy.

In the present case the defendant not only asserts his equitable title to a conveyance, but also sets forth a chain of circumstances which, if true, (and in considering this question they must be taken to be true) would give him a good legal title under the statute, and so far from showing an intention of abandoning that title, and acknowledging the plaintiff's right, the statements about a former ejectment which Mr. Douse, the plaintiff's agent, had not proceeded with, and the complaints that Mr. Douse had induced a person unable to pay costs or damage, to trespass on the land, instead of rendering himself liable to be sued, evinced his intention to resist their claim. It is impossible to hold this letter a sufficient acknowledgment.

Lastly, the plaintiff moves for a new trial, in consequence of the discovery of new evidence since the former trial. All the affidavits produced by the plaintiff, except that of Donald Buchanan I lay out of the question. First, because the facts deposed to, only go by inference to support or contradict what other witnesses stated on the trial. And, secondly, because they merely show the exercise of some acts of authority over the land similar to what numerous witnesses for the defendant swore to have been exercised by Nicholson and McLean, and numerous witnesses for the plaintiff swore to have been exercised by, or under the authority of the lessors of the plaintiff; and probably, if a dozen new trials were granted, all the persons who had cut or had seen others cut, or talked with Johnston about the disputed land, might not have been discovered, and either party who was unsuccessful could bring similar affidavits to support a similar

(1) 10 M. & W. 572.

application. But the affidavit of Donald Buchanan stands in a very different light.

Among other evidence offered by the defendant to show that Donald Nicholson was in possession under an agreement to purchase, a letter from Johnston to John Nicholson without date, was put in evidence, in which the following passage occurred: "When your brother returns let me have an account of his second purchase, and a description of the land contained in his deed, so as I may see how the matter of the Point ought to be adjusted before I draw Malcolm Buchanan's deed, which you heard me promise to do."

The second purchase alluded to in this letter, it was contended at the trial, had reference to the *locus in quo*, and no doubt, the letter produced a considerable impression on the jury. The affidavit of Donald Buchanan states that Murdoch Buchanan, his father, was in possession of ninety-six acres under an agreement from Earl Selkirk, which ninety-six acres were bounded on the north by the farm owned and occupied by Donald Nicholson; that Donald Nicholson wished to get a piece of this ninety-six acres, called the Point, to give him access to deep water; that his father had agreed to let him have it, but that he afterwards declined to do so, and in 1818, got his deed from Johnston for the whole ninety-six acres; and it is contended that this piece of the Point must, therefore, be the second purchase alluded to in Johnston's letter, and from this statement it seems highly probable that it is. The question is, does the discovery of this evidence entitle the plaintiff to a new trial? Although this letter, in my opinion, made a considerable impression on the jury, at the same time, if it had not been produced at all, there was ample evidence to authorize the jury in finding as they did. Mr. Archbold, (1) states the practice to be, that, "if new evidence have

(1) p. 1332; 12th Edn. p. 1529.

been discovered after the trial such as to satisfy the Court that if the party had had it at the trial he must have had a verdict, the Court will grant a new trial on payment of costs, in order to do justice between the parties." And at page 1336 (1) he says, "In ejectment, where the verdict is for the defendant, the Court will seldom grant a new trial, because the plaintiff may, if he will bring a new action, but otherwise, if for the plaintiff, and the circumstances of the case warrant them in granting it." And the same doctrine is laid down in Adams on Ejectment 327. In *Weak v. Callaway*, (2) where the Court granted a new trial after verdict in ejectment for the defendant, the affidavits stated a discovery of new evidence which would have entitled the lessor of the plaintiff to a verdict, and also, that if a new trial were not granted the lessors of the plaintiff would be obliged to make an entry to avoid a fine.

In the present case it is by no means certain that if the letter, which the new evidence is intended to explain, were not produced at all, the verdict would be for the plaintiff. There was strong evidence of Nicholson's possession without it. The testimony of Martin Martin that Johnston, who sued out the attachment for his father against Nicholson's property, told him to attach the *locus in quo* as part of it, which was done, would, if believed, it seems to me in connection with other evidence given at the trial, be looked at by the jury as almost conclusive, and this testimony is much strengthened by the statement in John Cantilo's affidavit (produced by the defendant in showing cause), that on the deponent's applying to Johnston for the land in 1818, he replied "that he had nothing whatever to do with the land now, that it belonged to Nicholson," and also by the statement in the affidavit of Hector McKenzie, that on his making a similar application to Johnston, in 1825, he said, "the

(1) 1533 of 12th Edn.

(2) 7 Price 677.

land belonged to a person then in Britain and not on the Island, and that there was none in the Island that could give a title to it, but he thought if any person wanting it would apply to the right owner it could be got pretty reasonable." It was remarked by the plaintiff's counsel with respect to this last affidavit, that Alexander McMillan might have been the person in Britain to whom Johnston alluded, but this could not be the case as this conversation with Johnston took place in 1825, and the deed from Alexander McMillan to the lessors of the plaintiff is dated in 1820, five years before. It is difficult to see to whom Johnston could have alluded, unless it were the representative of Nicholson who, it appears from evidence, was then in Britain.

If the plaintiffs' right would in this case be concluded by the result of this action, there would be strong reason for the Court's stretching its discretionary power to the utmost in their favor, so as to permit a further investigation ; but, as from anything that appears, the plaintiffs can succeed as well on an action commenced in 1853, as on that now pending, I think I should, under the circumstances of this case, be going very far beyond what the authorities warrant, in granting a new trial.

The rule must, therefore, be discharged.

WEATHERBIE V. GREEN.

Foreign bankruptcy a bar to action on debt contracted abroad.
Proof of foreign law by oral evidence of professional men.

9th May, 1853.

Mr. Longworth, for plaintiff.

Mr. Charles Palmer and Mr. Brecken, for defendant.

PETERS J. The debt in this case was contracted in New Brunswick, where the defendant became bankrupt and obtained his certificate.

It was contended that the certificate was no bar. Secondly, that the Bankrupt Act of New Brunswick was not properly proved.

As to the first question, it is clear that contracts are governed by the *lex loci*, and therefore what is a discharge where the debt is contracted is a discharge everywhere.

As to the second point. The witness Palmer, a barrister practising in New Brunswick, proved the printed copy of the New Brunswick Bankrupt Act, purporting to be printed by the Queen's Printer, and that it would have been received as containing the Act in the Courts of that Province. All the authorities are reviewed in the *Baron De Bode's* case, (1) from which case it is clear, that the written law of a foreign country may be proved by the oral evidence of professional men.

Vide Vander Donckt v. Thelluson (2) where a person not a lawyer but a broker was permitted to give evidence of foreign law relating to bills of exchange.

Rule discharged.

(1) 8 Q. B. 208 : S. C. 10 Jur. 217. (2) 8 C. B. 812 : S. C. 19 L. J. Q. B. 12.

ELIZABETH YOUNG v. THOMAS YOUNG.

Witness remaining in Court—In discretion of Judge to allow him to be examined.

At the trial all the witnesses were ordered to withdraw. The defendant, however, remained and was tendered as a witness but refused by the Court, and a verdict found for the plaintiff.

Held, (Peters J.) in discharging a rule for a new trial, that the rejection or admission of the witnesses' testimony was entirely in the discretion of the Judge, that the witness was rightly rejected.

MOTION for a new trial on the ground of improper rejection of evidence.

12th January, 1854.

Mr. Longworth, showed cause.

Mr. E. Palmer, *contra*.

Cur. ad. vult.

25th January, 1854.

PETERS J. The only point in this case on which I had any doubt, was whether the defendant was properly rejected as a witness.

At the commencement of the cause on motion of the plaintiff's counsel, all the witnesses were ordered to withdraw. The defendant, however, remained in Court, and at the close of the evidence was tendered as a witness. I refused to admit him on two grounds. First, because I was under the impression that it had been decided that a party to the cause who intended to give evidence must not be in Court when the other witnesses are examined, but I have not been able to find the case, and I am probably mistaken on this point. Secondly, I rejected him because he had remained in Court after the witnesses had been ordered to withdraw.

It is contended by the plaintiff's counsel that the judge has no power to reject a witness on that ground, but only to punish him for contempt for disobeying the order, and

the *dictum* of Lord Campbell in *Cobbett v. Hudson*, (1) is relied on.

As the power of the Court to adopt the most effectual mode of compelling the separate examination of witnesses, is thus called in question, it will be well shortly to review some of the authorities on which this power has been supposed to rest.

In *Rex v. Webb* cited in the note to *Beamon v. Ellice*, (2) Best, C. J., rejected the witness "though he was the attorney in the cause."

In *Parker v. McWilliam*, (3) Tindal C. J. says, "the rule with respect to the rejection of the testimony of witnesses who have remained in Court after an order for their exclusion has obtained in the Court of Exchequer for many years, and is universally known there. It was established in favor of the subject, and with a view to the fairness of proceedings chiefly at the instance of the Crown. But no such inflexible rule or practice has been established in the other Courts; and where an order has been made for the exclusion of witnesses, if it be disobeyed by any one of them, it must rest with the judge to ascertain whether he remained by accident, or purposed to evade the order." And the other three judges, Parke, Gaselee, and Bosanquet, in giving their opinions all say expressly, "that the admission of a witness who has remained in Court notwithstanding an order for retiring, must depend under all the circumstances of the case on the discretion of the judge who presides at the trial."

In *Cook v. Nethercote*, (4) where a witness was objected to on this ground, Alderson B. observes, "that would be no ground for rejecting his evidence. It would only be matter of observation respecting his testimony. In one case the judges granted a new trial, because a


(1) 17 Jur. 488; S. C. 1 El. & B. 11: 22 L.J. Q.B. 11. (3) 6 Bing. 683: S. C. 4 M. & P. 48.

(2) 4 C. & P. 585.

(4) 6 C. & P. 741.

witness' evidence had been rejected by reason of his having remained in Court after an order for witnesses to withdraw. But in the note it is said that the case to which the learned Baron referred was nowhere in print, and it is further to be observed, that in the exercise of his discretion the judge may not have seen fit to reject the witness, though his language as reported would seem to go beyond that.

But in the subsequent case of *Thomas v. David*, (1) on a similar objection being made, Coleridge J. says, "the rule you refer to in the Court of Exchequer is confined to revenue cases; in other cases, the rule there is the same as in the other Courts, namely, that the rejection of the evidence is entirely in the discretion of the judge; and that being so, I think that under the particular circumstances of this case I shall be exercising a sound discretion in receiving the evidence."



In the recent case of *Cobbett v. Hudson*, (2) Lord Campbell observes, "with respect to ordering the witnesses out of Court although it is clearly within the power of the judge and he may fine a witness for disobeying this order, the better opinion seems to have been, that this power is limited to the infliction of the fine, and that he cannot lawfully refuse to permit the examination of the witness," and he cites the cases of *Cook v. Nethercote*, (3) *Thomas v. David*, (1) and *Rex v. Colley & Sweet*, (4) (in which last case Littledale after consulting with Gaselee, laid down the same doctrine that it depends on the circumstances of the case whether to receive or reject the witness.) Upon this case it is to be observed that it was not necessary, and the language of Lord Campbell shows that he did not intend to give any decided opinion on the point.

(1) 7 C. P. 350.

(2) 17 Jur. 488.

(3) 6 C. & P. 741.

(4) M. & M. 329.

Archbold, (1) Roscoe, 126; and Starkie, 189, all authors of acknowledged authority though they cite the same cases, expressly lay it down that the admission or rejection is entirely a matter in the discretion of the judge. The language of Mr. Starkie is very decided, he says, "for the purpose of furthering the object of cross examination, the Court will in general, at the instance of either party, direct that the witnesses should be examined each separately apart from the hearing of the rest. A strong test to try the consistency of their account."

"Where a witness remains in Court after an order for their exclusion, the rejection or admission of his testimony is a question for the discretion of the judge under the circumstances of the case."

The weight of authority seems decidedly in favor of the Courts possessing this power which has been heretofore always acted on, and which appears to me in many cases indispensable to the correct administration of justice, and I think we should require something far stronger than the *dictum*, much less the mere *semblance* of a single judge, before we can consider those authorities and this practice overruled.

With respect to the propriety of rejecting the defendant in the present case, where a party intends to become a witness he must, at least, be subject to all the rules applicable to other witnesses. The contest at the trial turned on two points. First, as to a system of annoyance offered by the defendant to the plaintiff, which compelled her to quit his house.

Second, respecting the eight bushels of oats, part of the plaintiff's share in 1852, alleged to have been retained by the defendant. On both these points the plaintiff gave evidence, and parts of her story were contradicted by other witnesses. The defendant having heard all the evidence might easily shape his statement, so as not to contradict

(1) 378: see 12th Editn. 392.

those parts that were corroborated by other witnesses, and flatly contradict the plaintiff where she was not; whereas, had he been out of Court he could scarcely have materially deviated from the truth without clashing not only with the plaintiff's statements, but with the testimony of some of the other witnesses. It appeared to me, therefore, that the receiving of his testimony, when it was offered, would, under all the circumstances of the case, been allowing him a very unfair advantage, and as the consideration I have since given confirms me in the opinion that I was right in rejecting him, I think the rule should be refused.

ROBINSON, APPLT. V. McQUAID AND OTHERS, RESPTS.

Board of Education—15 Vic., c. 15—Order locating Schoolhouse within three miles of another—School rate—Appeal.

Appeal from a conviction for a school rate. The 15 Vic., Cap. 15, section 25, enacted that a schoolhouse could not be legally located within three miles of one already established under the Act. In this case the school was located within the limit and it was contended that the Board of Education had no power to establish it and the rate was therefore void, in answer to which respondent's counsel contended that the decision of the Board establishing the school (until reversed on *certiorari*) was conclusive and that no evidence could be heard to contradict it. Section 15 of the Act also provided that when a settlement desired the erection of a new school district, five of the inhabitants should make a request therefor in writing to the Board which was then to "proceed as pointed out by the Act." The requisition was dated in January, 1853, but the Act did not come into force until April, and it was urged that the requisition must have been to the former Board, which had not the powers of the present one.

Held, (Peters J.) that the decision of the Board (until quashed) was conclusive and that in collateral proceedings no evidence could be heard to contradict it.

2. That the requisition was not such as the Act required and that all proceedings founded on it were void.

Mr. Lawson for Appellant.

Mr. Longworth for Respondents.

25th January, 1854.

PETERS J. This was an appeal from a conviction of a justice of the peace for a school rate, under the 15 Vic. c. 13, and several important questions on the construction of the Act are raised.

First, it is contended that the schoolhouse for which the rate was made, being within the distance of three miles of another registered school, the Board of Education had no power to establish it, and that consequently, the rate is void.

As to this point, there can be no doubt, that under the provisions of the 25th section, the Board of Education

cannot legally locate a schoolhouse within three miles of one already established under the Act.

But it is contended by the respondent's counsel that the decision of the Board of Education on this point (until reversed on *certiorari*) is final and conclusive, and that no evidence can be heard to contradict it, by showing that the schoolhouse is within three miles of another established school. It is a well established principle of law, that where a tribunal having power to adjudicate on a particular subject matter does adjudicate thereon, evidence is inadmissible in any collateral proceeding, to show that the adjudication is erroneous; but where there is a total want of jurisdiction, evidence is there admissible, to show that the tribunal had no power to adjudicate on the subject matter. Thus, "if one be rated to the poor who is neither an inhabitant nor occupier of land within the parish, and his goods be distrained for the rate, he may maintain an action against the person levying." See *Fawcett v. Fowles* (1). and *Weaver v. Price* (2). On the argument, the present case seemed to me to fall within the principle of the latter class of cases, but on a careful consideration of the duties of the Board of Education, under the Act, it seems impossible to distinguish it from those cases in which the adjudication has been held incontrovertible.

In *Brittain v. Kinnaird*, (3) in trespass for distraining a vessel, it was held that a conviction under the Bomb-boat Act was conclusive evidence that the vessel was a boat within the meaning of the Act, and properly condemned, and evidence to show that she was not a boat was rejected, and on the counsel suggesting that on the same principle the magistrate might condemn a "seventy-four" and call it a boat, the Court said, even in that case, until the conviction was quashed, it would be conclusive.

(1) 7 B. & C. 394.
(2) 3 B. & Ad. 409.

(3) 1 B. & Bing. 432.

So in *Gray v. Cookson* (1) a magistrate having made an order as against an apprentice, it was held that evidence of a previous dissolution of the apprenticeship (which if admitted, would have shown a want of jurisdiction in the magistrate,) was rightly rejected.

The principle on which these cases and numerous others of a similar class were decided, was, that the magistrate had a general jurisdiction over the subject matter in dispute, and had, therefore, to enter on the inquiry, as to the particular fact attempted to be controverted, viz., in the first case, whether the vessel seized was a boat, and in the second, whether the party was still an apprentice, and that it was for him to decide as to the truth of these facts, and, however erroneous the conclusion he found on those facts might be, until quashed on appeal, or *certiorari*, it was conclusive. The fifteenth section of the Act confers a general power on the Board of Education to choose and define school districts, and to determine the sites of schoolhouses; but by the twenty-fifth section it is restricted from locating a schoolhouse within three miles of one previously established under the Act. In order to perform the general duty imposed on it, the Board must, amongst other inquiries, ascertain the fact, whether the proposed site of a new schoolhouse is within three miles of another, and having, as in this case, determined that it is not, however erroneous and contrary to the truth that decision may be, on the principle of the cases I have already alluded to, it is conclusive in collateral proceedings such as this, and we cannot receive evidence to contradict it.

Thirdly, it is objected that the proceeding of the Board is void on its face.

By the fifteenth section it is provided "that as often as the inhabitants of any settlement shall desire the erection of a new school district, five of such inhabitants shall

(1) 16 East, 13.

make request in writing, notifying such their desire to the said Board of Education," then "the Board shall proceed as pointed out in the Act." Unless such requisition be made to the Board it has no power to act at all. It was, therefore, necessary for the respondent to prove a requisition. Now the requisition proved in this case is dated January, 1853, whereas the Act did not come into operation until April, following, and it is contended that this can be no requisition to the Board constituted under this Act; that it is, in fact, addressed to the old Board of Education, an entirely different body, who had no such powers as those possessed by the present Board. To this it is answered that the requisition was, evidently, intended for this present Board, and that it has been recognized by some of the parties to it since it came into the possession of the new Board. From the evidence of Mr. Cundall, it appears that he was secretary to the old Board, and that he also fills the same office to the new one, and the requisition was handed over to the new Board, or rather, remained in his possession with the other papers. Now the Act requires a request to the Board appointed under it. That this requisition was not addressed to that Board is certain, because, at the time of its being made and delivered to the body to whom it was addressed by the requisitionists, the present Board was not in existence. Suppose, instead of being addressed to the Board of Education, it had been addressed to the Governor in Council, or to some individual and that it afterwards found its way into the hands of the present Board of Education, would that have been a requisition on which valid proceedings could have been founded by the Board? I think not, because it would not be in the terms of the Act, "a request in writing notifying their desire to the said Board of Education,"—that is, the Board mentioned in the Act. There is no magic in the term Board of Education, though the body to whom this requisition is addressed happen to be so designated, that cannot

make these proceedings valid, unless a requisition addressed to the Governor in Council, or an individual who had no authority in the matter, being handed to the Board, would have done so.

As to the argument that the requisitionists had acquiesced, or assented to the new Board treating this requisition as addressed to it, it is not necessary so decide whether it could have been rendered valid by such means, because there is no evidence to shew that all the five parties to it did acquiesce, or assent to it, and even if they did, that acquiescence or assent consisted of conduct, demeanor, and oral applications to, or conversations with the Board, or its secretary. If these were admitted to support the requisition, it seems to me it would not be a requisition "in writing," which the Act expressly requires. And where an Act requires a proceeding to be in writing we have no power to allow an oral one to be substituted for it. In all proceedings of this kind the particular mode of proceeding pointed out by the Act must be followed; if we once depart from it, it would be difficult to know where to draw the line. I think, therefore, that the requisition in this case was not such a requisition to the Board of Education as the Act requires, and consequently, that all the proceedings of the Board founded on it are void.

The decision on this point renders it unnecessary to decide whether the action should have been brought before the Commissioners' Court. But on reading the whole of the 32nd section it is evidently the intention to give justices of the peace a concurrent jurisdiction with the Commissioners' Court.

The judgment below must be reversed.

DOE DEM. TULLIDGE V. ORR.

Statute of Limitations.—Absence from country without receiving rents, &c., not necessarily a discontinuance of possession. Presumption of continued residence in place of domicile.

W. W. owned the Retreat Farm. He left P. E. Island in 1805 leaving his son R. W., through whom plaintiff claimed, in possession, and never returned. On 3rd May, 1806, W. W. conveyed to K., a resident of England, who in 1810 conveyed to D. R., who died in 1823, never having been on P. E. Island, and the farm became the property of D. S. R., who came to the Island in 1839. In 1842 he conveyed the farm to defendant who entered into possession of part of it, but R. W. continued to reside on the remainder until the end of 1846 when he removed and subsequently died. T., sister to R. W., sought to recover the farm on the ground that he had acquired a title by possession.

Held. (Peters, J.) that W. W. was in possession until May, 1806, when he conveyed to K., and the Statute did not begin to run until then.

2. That K. being a resident abroad, the presumption is, in absence of evidence to the contrary, that he remained there and that the disability of absence was not removed and that, therefore, he or those claiming under him would not be barred until the lapse of 40 years, and as O. entered in 1842, R. W. never acquired a title.

Motion for a new trial on behalf of defendant.

Mr. T. Stewart, Mr. Longworth, and Mr. C. Palmer, for plaintiff, show cause.

Mr. Forgan, Mr. Lawson, and Mr. E. Palmer, *contra*.

31 Oct., 1855.

PETERS J. In this case it appears that Captain Wm. Winter was possessed in fee of the *locus in quo*, called the Retreat farm, on Lot 23, and on which he resided from 1792 until the autumn of 1805 when he left the Island, leaving his wife and Robert Winter, their son (through whom the lessor of the plaintiff claims) in possession. The wife left the Island about two years afterwards, Robert Winter continuing in possession. Capt. Winter never returned to the Island. By indenture dated 14th July 1792, Capt. Winter had mortgaged

Lot 23, including the Retreat farm, to William and Jacob Kirkman, residents of England, and by deed dated 3rd May 1806, he released the equity of redemption to the mortgagees who, by indenture dated 5th July 1810, conveyed the premises to David Rennie who died in January 1823, never having been on the Island, whereupon the Township descended to his sons Robert Rennie and David S. Rennie. In 1840 or 1841 the Township was divided and the Retreat farm fell to the share of David S. Rennie. David S. Rennie first came to the Island in 1839. In 1842 David S. Rennie conveyed the *locus in quo* to the defendant. It appeared that for some time previous to 1842 Robert Winter had been weak in his intellect, and made little use of the cleared land on the farm, and that defendant on getting his deed entered into possession and cultivated the largest part of the cleared land. Robert Winter, however, continued to reside in the house until about four months before his death, when he removed to a neighbor's house where he died in March 1847, and the defendant ever since has been in possession of the whole farm. The lessor of the plaintiff is the sister of Robert, and now seeks to recover the premises on the ground that Robert Winter acquired a statutable title by possession previous to his death.

The first question to be decided is, at what time the Statute began to run. The third section of the Statute 7 Wm. 4 cap. 30, which fixes the period at which the right "to make an entry or bring an action shall be considered as first accruing," provides that "when the person claiming such land or some person through whom he claims shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land and shall, while entitled thereto, have been dispossessed or have discontinued such possession or receipt, then such right shall be deemed to have accrued at the time of such dispossession or discontinuance of possession." There is

no evidence to shew that the son or wife on Captain Winter's leaving the Island held adversely to him. Capt. Winter was not, therefore, dispossessed. Did he discontinue the possession? The facts are that he left the Island in 1805 leaving his son and wife in possession. Was that act a discontinuance of possession? If so, then every one who leaves the Island for a few months leaving his family in his house must, under this Act, be considered as having discontinued his possession. But no such legal consequence follows. In such case the possession of the wife or son or other person left in charge is the possession of the owner. The fact of Capt. Winter's leaving the Island in 1805 leaving his wife and son in possession is no evidence of a discontinuance of possession on his part. Undoubtedly the subsequent conduct of the owner, such as declarations of his intention in leaving, long continued neglect of the property, as in *Corbyn v. Bramston* (1) or other circumstances might afford evidence to shew an intention of abandonment or discontinuance of possession at a period when, but for such declarations or conduct, the owners' relations with the person left in charge would rebut the presumption of any such intention. But no such evidence appears in this case. On the contrary, in May 1806, about 7 or 8 months after leaving the Island, he conveys the property to his creditor, to whom it had been previously mortgaged. I think, therefore, that up to May 1806, Capt. Winter must be considered in possession, and that the Statute had not up to that period commenced to run.

The third section also provides that "when the person claiming such land shall claim in respect of an estate, or interest in possession granted or assumed by any instrument (other than a will) to him, or some person through whom he claims by a person being, in respect of the same estate or interest, in the possession or receipt of the

(1) 4 N. & M. 664: S. C. 3 Ad. & E. 63.

profits of the land, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which such person, claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument." On the 3rd of May 1806, William and Jacob Kirkman became entitled by the deed from Capt. William Winter to the possession, and at that time, therefore, under the express words of the third section the Statute began to run.

It was urged on the argument that there was no evidence to shew that the Kirkmans continued under the disability of absence to the expiration of the forty years, or I presume to within ten years prior to that period.

The thirteenth section provides that a person under disability of absence shall have ten years to bring his action after the disability ceases. The statute, evidently, intends that the removal of the disability shall be by such persons returning and barring (in the words of the second section) the right to make an entry or bring an action, but, if during that absence he has parted with his estate, his return cannot, it appears to me, remove the disability, because he does not come clothed with the power contemplated by the statute, viz: the right of entering or bringing an action. It is quite true that the disability is personal, that is, that a party against whom it has begun to run cannot by subsequent conveyance transfer the disability so as to make its continuance depend on the acts of other parties. This was decided in *Stackpole v. Stackpole*, (1). But if by conveying his estate it has become impossible to return clothed with the right to make an entry or bring action, the disability is not transferred to others, but is merely, by the circumstances which have happened, prevented from being removed by the party's return, and must continue until the other event pointed

(1) 4 Warren & Drury, 320.

out by the statute for determining it, viz: the death of the person to whom the disability of absence first attached happens. And there being no evidence to shew that Kirkmans are dead the presumption of law is, that they are still alive. But it is unnecessary to decide this point as I think there was sufficient *prima facie* evidence to shew that the Kirkmans continued absent. The degree of evidence necessary to shew that the person continued absent must depend on circumstances. If a person be a resident of this country, the shewing him absent at a particular time would be no evidence that he continued absent, because the natural presumption is, that he would return to his home, but where, as in this case, it appears that the party is a resident in another country, the presumption (in the absence of any evidence to the contrary) is, that he remained at home, and had the case been put to the jury, on that point, they would, no doubt, have found for the defendant.

Sir E. Sugden, in his treatise on Real Property Statutes page 35, says, "although when the time has once begun to run the party to be affected cannot by any settlement create new rights, yet, persons so claiming under him will have the same time to bring an ejectment as he himself would have had if he had continued alive and remained owner of the estate."

The statute in the present case began to run against the Kirkmans in May 1806, and as they continued absent, and must be presumed alive, they, or those claiming under them, would not be barred until the expiration of forty years viz., in May 1846, and until that period the persons in adverse possession could acquire no title. But in this case the defendant claiming under Kirkmans enters into possession in 1842; Robert Winter, therefore, never acquired any statutable title, and, consequently, had no estate which could descend to the lessor of the plaintiff. It is true there was evidence to shew that Robert Winter

occupied the old house up to 1847, but whatever effect that might have as to the house itself, or the spot on which it was situate, it cannot defeat the right of the defendant who claims under a good documentary title to the rest of the farm of which he had possession in May 1846.

The rule for a new trial must be absolute.

McKINNON V. McKINLEY.

Distress. Bailiff may use force necessary to ascertain if door is fastened.

Mr. C. Palmer for plaintiff.

Attorney General, *contra*.

23rd January, 1856.

PETERS J. The distress was made in a barn. The door was fastened inside with two pins. Defendant put his hand against it to try if it was fast, and it fell in. The ordinary way of opening it was by going on the inside and taking out the pin and lifting the door out. The Chief Justice told the jury (in an action of trespass against defendant) that if the door fell in by defendant's pressure, however slight, it was a trespass. The Court are of opinion that the direction was wrong. It should have been that if defendant used no more force than was necessary to try if the door was fastened, and in consequence of that, from its insecure fastening, it fell in, it was no trespass.

New trial granted.

THE ATTORNEY GENERAL V. WESTAWAY.

Highway Act, 14 Vic., cap. 1, section 16—Information—Demurrer.

An information for preventing the opening of a road directed to be laid out by the Governor in Council, under 14 Vic., cap 1. sec. 16, must allege that the road ran through defendant's land.

Demurrer to information by Attorney General, argued 22nd January, 1856.

Mr. Charles Palmer for defendant.

The Attorney General *contra*.

Cur. ad. vult.

24th January, 1856.

PETERS J. This was an information by the Attorney General against the defendant for preventing the opening of a road directed to be laid out by the Governor and Council, under 14 Vic., cap. 1, sec. 16. To which there is a general demurrer.

The information alleges that the Governor did order the opening of a certain line of road, leading from the main road at Aitken's, township 59, to the road leading from St. Andrew's Point toward Murray Harbor. It then sets out the appointment of Commissioners as directed by the Act, to appraise the damage to the persons through whose land the road runs, and the return of the Commissioners awarding £15 to the defendant. But there is no allegation in the information that the road directed by the Governor to be laid out, and which the Commissioners were appointed to examine ran through the plaintiff's land, and I think the want of such allegation is fatal to the information. It is true the return of the Commissioners states that they have examined the advantage or disadvantage to owners over whose land the road runs, but this part of the information is a mere recital of their return, necessary only as showing that the directions of the statute as to appraisement, have been complied with. The defendant

might have traversed the return, but by the rules of pleading no issue can be taken on a mere recital, or statement contained in a document recited, and therefore the return or any statement in it cannot supply the place of a material and necessary allegation, and even if issue could be taken upon it, it is not an allegation that the road directed to be laid out by the Governor was the road the Commissioners examined, because the order of the Governor, as set out in the previous part of the information, only directs a road to be laid out from one existing road to another, without saying at what precise point of the existing road it is to start, or the course or courses it is to run until it reaches its terminus at the other road. There is, therefore, nothing to direct the Commissioners to the precise line of road to be laid out, and *non constat* from anything that appears in this information they may have examined quite a different line of road from that the Governor intended to be laid out. I do not mean to say that it was necessary to set out the starting point and the courses of the road. Such particularity is not necessary in pleading. The allegation in the information, that a certain road in such a parish leading from one existing road to another, is sufficiently certain in that respect. But there must also be a substantial allegation that such a road ran over the defendant's land. The defendant could then traverse the fact that the road ran over his land, and evidence of the place of commencement, and the course of the road would enable a jury to determine the issue. But if this information were held good, the Commissioners might examine a different line of road from what the Governor intended, and the defendant could take no traverse which would raise an issue as to the fact.

There must, therefore, be judgment for the defendant.

DOE DEM. YEO v. BETTS.

Ejectment—Sheriff's deed under 11 Vic. cap. 7—Want of notice cured by section 22.—Deed void if land not described by metes and bounds at sale.

The 7th sec of 11 Vic. cap. 7 enacts that before proceeding to sell land taken in execution under that Act the sheriff shall at the sale publicly declare the metes and bounds thereof. Sec. 8 enacts that no omission of any direction relative to notice or forms shall render a sale invalid. The locus was sold by the sheriff and bought by Y. for a trifling sum. It appeared that notice of sale had not been duly given by the sheriff, and also that the land was not described at the sale by metes and bounds. Y. brought ejectment and obtained a verdict. In the argument on a rule to set the verdict aside and for a new trial two questions were raised. (1) That plaintiff must prove due notice of sale. (2) That the land had not been described at the sale by metes and bounds and the sale was therefore void.

Held, (Peters J.) That the want of notice being in a proceeding previous to the sale was cured by Sec. 22 of the Act.

2. That the want of description by metes and bounds at the sale was a defect, which was not cured by Sec. 22, and rendered the sale invalid.

Rule to set aside a verdict for plaintiff and for a new trial granted 1st Nov. 1855.

23 Jan., 1856.

Mr. Longworth for plaintiff, shews cause.

Mr. Lawson and Mr. Haviland follow.

Mr. Edward Palmer and Mr. Charles Palmer, *contra*.

Cur. ad. vult.

6 May, 1856.

PETERS J. This was an action of ejectment brought to recover lands sold by the sheriff under 11 Vic. cap. 7, for non-payment of land tax, and two questions were raised.

First, it is contended that the plaintiff was bound to prove that the notices of sale required by the Act had been duly given by the sheriff. Second, that it appeared

that the land was not described at the sale by metes and bounds as directed by the 7th sec. of the Act.

For the plaintiff it was contended that the provision respecting notice is merely directory, and that if not, the want of notice is cured by the 22 sec., and that even if it were not, in the absence of any evidence to the contrary, it will be presumed that the sheriff acted rightly and gave due notice.

In *Rex v. Lonsdale* (1), Lord Mansfield says, "there is a known distinction between circumstances which are of the essence of a thing required to be done by an Act of Parliament and clauses merely directory. The precise time in many cases is not of the essence, while no one ever thought that the number of overseers was directory."

In *Doe d. Phillips v. Evans*, (2) the Insolvent Act, 1 Geo. 4, cap. 117, sec. 7, directed that the general assignee should sell any real estate of the insolvent within two months after the assignment by public auction, in such manner and at such place as the major part of the creditors of the insolvent who should assemble together on any notice in writing, published in the London Gazette, should under his, her or their hands approve. In ejectment on a conveyance from an assignee made two years after the assignment, and no proof of a compliance with the provisions of the Act, the notice and meeting of creditors, &c., thirty days before the sale the provisions were held merely directory, and the plaintiff recovered.

In that case the essence of the thing to be done was the sale and conveyance of the property, the preliminary notices and meetings were only collateral matters. It must, however, be remarked that the legal estate in that case was vested in the assignee by virtue of the assignment from the insolvent, and the assignee did not, therefore, convey under a statutable power.

(1) 1 Burr. 444 at p 447.

(2) 1 C. & M. 450; S. C. 3 Tyr. 339.

In *Perry v. Bowes* (1), and *Elliot v. Danby* (2), a lease from commissioners of a bankrupt was held not to pass the estate until the enrolment required by the statute, because the commissioners had not the legal estate, but only executed a power given them by the statute, and must therefore execute it with all the circumstances required; and this distinction is alluded to in *Doe d. Phillips v. Evans* (3), where, on the counsel observing that the enrolment in those cases did not go to the essence of the thing, Bailey B. observed, "that was a statutable conveyance not allowed by the common law. The whole estate is here vested in the assignee, he is not a mere conduit pipe," and again, "this is not the mere exercise of a power. The exercise of a power is where I have a right to appoint over your property. If I have the legal estate I do not exercise a power."

In *Rex v. Haslingfield* (4), and *Doe d. Nanney v. Gore* (5), which arose under English inclosure acts, the commissioners acted under a statutable power, and the provisions of the act with respect to notices was held imperative.

In the case of sales of land by a sheriff, Chancellor Kent says, "the deed connected with the sale operates by way of execution of a statutable power" (6). And the same doctrine viz., that a sheriff has no estate, but acts under a power (though not statutable) prevails in England on sales of leasehold interests in land under a *Fi. Fa.*, *Doe d. Hughes v. Jones* (7).

By analogy to the rule which prevails in the execution of powers contained in indentures it would seem that where a statute, giving a power to sell and convey land, requires notice, it must always be held imperative. In Sugden on Powers 267, it is laid down, "if notice is

(1) Ventris 360.

(2) 12 Mod. Rep. 3.

(3) 1 C. & M. 450.

(4) 2 M. & S. 558.

(5) 2 M. & W. 320.

(6) 4 Kent's Com. 431.

(7) 6 Jur. 302; S. C. 9 M. & W. 372.

required to be given the execution of the power will be void if notice be not given accordingly. So in every case that the sagacity of man can devise the terms of the power must be complied with."

In *Rex v. Croke* (1), where a statute empowered commissioners to take land for a road, and it was amongst other things, objected that the required preliminary notices had not been given, Lord Mansfield says, "this is a special authority delegated by Act of Parliament to particular persons to take away a man's estate against his will, therefore, it must be strictly pursued."

The impression has I believe been, that the provisions respecting notices in statutes empowering sheriffs to sell lands are not directory but imperative, and which seems recognized by the Legislature, as by 9 Wm. 4, cap. 4, the *onus* of proving want of notice is thrown on the party impeaching the sheriff's deed, and that the same strictness of proof was deemed necessary by similar Acts in New Brunswick appears from the judgment of Parker J. in *Linton v. Wilson* (2), who in speaking of an Act similar to our own Act of 7 Wm. 4, cap. 4, says, "the necessity of proving certain acts which the law made requisite to a sheriff's sale was a mischief to be remedied." And what did this arise from? The difficulty of procuring *viva voce* testimony of the person who did the acts. Still it may be doubtful whether the rule laid down by Lord Mansfield in *Rex v. Lonsdale* (3), viz., that unless the thing to be done is of the essence the provision is directory, is not equally applicable to all conveyances made under the directions of statutes, whether the party making them has (as in the case of insolvent assignees) the legal estate or acts simply as the donee of a statutable power. In *Pearse v. Morrice* (4), Taunton J. says, "the distinction

(1) Cowper 29.

(2) 1 Kerr. 223.

(3) 1 Burr. 445.

(4) 2 Ad. & El. 84; S. C. 4
N. & M. 48.

between directory and imperative statutes has been long known. An early instance in which it was taken was *Rex v. Sparrow* (1). I understand the distinction to be that a clause is directory where the provisions contain mere matter of direction and nothing more; but not so where they are followed by such words as are used here, viz., "that anything done contrary to such provisions shall be null and void to all intents." The legal estate in this was in the trustees, but the language of the judge seems to apply to all cases where negative words are not used. And Dwarris, in his treatise on Statutes, seems to put both classes of cases on the same footing. And in *Doe d. Roberts v. Moyston* (2), where an inclosure act directed that the award should be made within six years, an award made after that time was held good. Creswell J. says, "this statute is not like the case of an ordinary submission to arbitration, with a proviso that the award shall be made within a certain time. The act directs certain lands to be inclosed, and certain persons to be appointed commissioners to make allotments. When the clause follows enacting that an award shall be made within a certain time I think this clause is directory only.

It is not, however, necessary to decide the point in the present case as we think the want of notice is cured by the 22nd sec. which enacts, "that no omission of any direction contained in this Act relative to notices or forms of proceeding previous to any sale shall extend to render such sale invalid, but the person guilty of such omission or neglect shall be liable to punishment therefor, and shall answer the party injured, &c." It was urged by defendant's counsel that this does not extend to a case where no notice of sale had been given but only to cases of defective notice, but it is impossible so to narrow the plain words of the Act. A notice of twenty days previous to the sale would be defective. If the section would cure

(1) 2 Strange 1123.

(2) 12 C. B. 268; S. C. 21 L. J. C. P. 178.

such a notice, so it would a notice of one day, and if so why not entire want of notice?

As to the second point the 7th sec. enacts, "that the sheriff or coroner before proceeding to sell such lands shall ascertain and at the sale publicly declare the metes and bounds thereof as particularly as the same can or may be described, and shall make and execute to such purchaser a conveyance thereof." It was urged that this provision was directory also, but this describing at the sale the land he is selling is clearly of the essence of the thing the sheriff is directed to do, viz., to sell the land, and it is the deed as connected with the sale which operates to pass the title to the purchaser; without such sale, therefore, no title passes by the sheriff's deed, and if the land sold was, when the hammer fell, uncertain, how is it possible to say that the land described in the deed afterwards given was the identical piece of land sold, and if it was not then the land described in the deed never having been sold, cannot pass by the deed. The provisions of the 11th sec. (which were not adverted to on the argument) also show that this provision was intended to be imperative. By that section the sheriff in selecting the quantity of the defaulter's land to be sold is required to have regard to the buildings and improvements of such defaulter, which he is not to sell if there is sufficient land remaining to realize the levy and expenses. Now if the precise lands are not known and pointed out at the sale how could the owner, if present, or any bidder know whether the buildings and improvements were selling or not? The former, under the impression that his buildings and improvements were safe, might allow the land to be knocked down at a small sum, and afterwards (if the description given at the sale could at all be departed from) a slight variation in the deed of a course or distance might include buildings and improvements worth hundreds of pounds, and which is in fact argued to have been the case in the present instance, the plaintiff having

bought the land for £4, 1s., and now claiming the defendant's mill and improvements which must be worth a very much larger sum.

It is further argued that even if the section is imperative the maxim "*omnia rite esse acta*" applies, and that it must be presumed that the sale was properly conducted. In *Williams v. The East India Company* (1), Lord Ellenborough says, "that the rule of law is that where any act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative and throws the burden of proving the contrary, that is in such case, of proving a negative on the other side." In *Doe dem Nanney v. Gore* (2), the notices under the Insolvent Act were presumed. So in *Doe d. Milburn v. Edgar* (3), the notices under the Insolvent Act were presumed. So in *Manning v. Eastern Counties Railway Co.* (4), where an inclosure Act authorized the commissioners to stop up a road with a proviso that no road should be stopped without the order of two justices of the peace, it was held that the award and the recital of the order was sufficient *prima facie* evidence that the road was stopped by order of the justices. Mr. Starkie, page 635, lays down the rule "that upon proof of title everything which is collateral to the title will be intended without proof, for although the law requires exactness in the derivation of a title, yet when that has once been proved all collateral circumstances will be presumed in favor of the right."

In *Fenwick v. Floyd* (5), cited Tingl. Adams, Ejectment 301, (N. 1) it is said, "in an action of ejectment by a purchaser under a sheriff's sale against a debtor who refuses to give up the possession of the land, it is incumbent on the plaintiff to produce the judgment and

(1) 3 East 192.

(2) 2 M. & W. 320

(3) 2 Bing. N. C. 391.

(4) 12 M. & W. 237; S. C. 13
L. J. Ex. 265.

(5) 1 Harr. & G. 172.

the *Fi. Fa.*, and to prove the sale, which may be done either by the deed from the sheriff or a return of the *Fi. Fa.*, they are sufficient to entitle him to recover."

It would be attended with the greatest inconvenience, if it were necessary in order to make out a title to lands under a sheriff's deed, to prove that all collateral matters required by the Act respecting the sale had been complied with. Such a title would not only be always doubtful, but would become insecure as it grew older since, though it might not be difficult to prove what the sheriff declared or did at a sale twelve months ago, it might be very difficult to prove what was declared or done at a sale which had taken place eighteen or twenty years ago. It appears to us that in all cases depending on titles of this kind, where the action is brought recently after the sale or where the purchaser is in possession, and there are no circumstances to rebut the presumption, the maxim "*omnia rite esse acta*" applies. In the present case the plaintiff's title was derived from the judgment, *Fi. Fa.*, and sale, which last being proved by the deed, the mode of conducting it, and the particular circumstances attending it (however necessary to its validity) were merely collateral matters, which under the authorities referred to would be presumed to have been rightly done. But this is merely a presumption, and where as in this case the matter is essential, negative evidence may contradict it by showing positively that the thing presumed was not done, or circumstances may raise a contrary presumption and thereby throw the *onus* of proving that it was rightly done back on the party in whose favor the presumption would otherwise have been made. Thus is *Rex v. Haslingford* (1), where an inclosure act gave commissioners power to set out boundaries of parishes and ascertain the parochial locality of roads giving certain preliminary notices to the parishes interested. It being shown that the Parish of Haslingford

(1) 2 M. & S. 558.

had continued to repair for sixteen or seventeen years that was held to do away with the presumption that all had been rightly performed, and to raise a presumption that the notices had not been given according to the act, because if that were so Haslingford ought not to have continued to repair.

So in *The King v. Inhabitants of Washbrook* (1), the description of the boundaries inserted by inclosure, commissioners in the newspapers differing from the description in the award proved that they had not followed the requisites of the act, and therefore had not pursued their power, and consequently the award was held void.

In the present case the plaintiff called the deputy sheriff to prove that he sold the land conveyed by the deed. In one part of his testimony he states that he sold the identical piece of land mentioned in the deed, but in another part he says the locality was pointed out, and it is quite plain from the whole of his evidence that he did not declare the precise metes and bounds of the land he was selling, or give such a certain or particular description of it as would enable it to be distinguished from other lands by which it was surrounded. We do not mean to say that it is necessary that the precise courses and distances should be declared. That would be one proper way of doing it, but if the sheriff declared that the land was bounded by certain known bounds, such for instance, as bounded by such a road or river on the front, on one side by the land of A, and on the other by the land of B, and in the rear by some other known and established boundary, we think that would be sufficient, even perhaps though the exact quantity was not known, but where he merely declares the locality, or that it is part of such a piece or tract of land without particularly describing what part, (which appears to have been what was really done:

(1) 4 B. & C. 732; S. C. 7 D. & K. 221.

here,) that is clearly insufficient both under this section of the act, and also we think under the law as it stood before, of which this section seems to us only an affirmation.

Thus in *Fenny ex d. Masters v. Durrant* (1), where the sheriff's return to an elegit stated that he had delivered an equal moiety of a house, the return was held void for not setting out the moiety by metes and bounds.

In a note to Til. Adams, on Ejectment 301, it is said "a sheriff's return to a *Fi. Fa.*, which states a levy on part of tract called, &c., is void for uncertainty and cannot be set up by matter dehors the return, and a sale under it passes no title. But a levy on a tract called, &c., under a *Fi. Fa.*, against a person who was seized of a part of such tract and a sale under it will pass his interest to the purchaser."

It was urged by the defendant's counsel that this defect was also cured by the 22nd section, but that section only applies to proceedings previous to the sale, and can have no effect on what should be done at the sale. If it did it would enable the sheriff to evade the requisites of the 7th section and open a door to all the evil and unjust practices which existed under the old mode of selling, and which the 6th section was intended to prevent.

We have considered this matter at greater length than was necessary for the decision of the case; but from the frequency of these sales and the increasing number of titles depending upon them, it seemed to us expedient that the construction of the act, the duty of the sheriff in conducting them, and the general principles of the law of evidence applicable to them should be considered somewhat at large.

The rule must be absolute.

(1) 1 B. & Ald. 40.

BOURKE V. MURPHY.

Certiorari—Public wharf—construction of statute abridging a public right—Lieut. Governor in Council has not power under 15 Vic. cap. 34, sec. 12 to impose rates on boats or head money on passengers using wharf—Term “vessel” does not comprehend “boat.”

The 15 Vic. cap. 34, sec. 12 gives the Lieutenant Governor in Council control of Minchin's Point wharf, with power to establish rates of wharfage for *vessels* and to make such rules and regulations as he may think fit. By an order under this section it was provided that any boat or vessel used by any one but the licensed ferrymen in ferrying passengers or landing *or taking off the same from* the wharf should pay 1s. for each passenger landed or taken off; also 2s. 6d. for each time such boat or vessel should touch at or land passengers on the wharf, to be paid by the persons owning or working such boat or vessel. A boat of the defendant's, used in ferrying without hire, on 16th May, touched several times at the wharf and sixty passengers embarked in the boat from the wharf. Judgment had been given for plaintiff in the Mayor's Court, and it was now removed by *certiorari* to the Supreme Court. The defendant's counsel contended (1) that under the act the Governor in Council had power to impose rates on *vessels* only, that a boat was not a vessel and the order was therefore void as to boats, (2) that the act gave no power to impose a charge of head-money in respect of persons embarking from the wharf in such a boat.

Held, (Peters J., Hodgson, C. J., concurring) That the Act is one abridging a public right and must be strictly construed, and it did not give power to impose such rates, and that the judgment in the Mayor's Court must be quashed.

4 July, 1856.

Mr. Longworth, Mr. Haviland, and Mr. Brecken for the plaintiff.

The Attorney General and Mr. Howe for defendant.

Cur. ad. vult.

12 July, 1856.

PETERS J. This case comes up by *certiorari* from the Mayor's Court, and is brought to test the validity of the seventh clause of an order of the Governor and Council,

made on the 15th May, 1856, under the authority of the Act of 15 Vic. cap. 34, respecting the wharf at Minchin's Point on the Hillsborough River.

By the twelfth section of the Act it is provided that "the public wharf at Minchin's Point opposite Charlottetown, on the south side of the Hillsborough River shall be under the management and control of the Lieutenant Governor and Council, who shall have power to establish the rates of wharfage to be paid by vessels using the same, and to make such other rules and regulations for the management of the said wharf as he may think fit from time to time."

The seventh clause of the order provides that "any boat or vessel employed or used by any person or persons except Henry Pope Welsh, the present licensed ferryman, or licensee of Hillsborough ferry opposite Charlottetown, or his successors therein, in systematically ferrying for or without hire passengers, &c., over the said ferry, and landing or taking off the same from the said wharf, to pay the rate of one shilling for each and every passenger landed on or taken off the said wharf, and also the rate of two shillings and sixpence for every time such boat or vessel shall touch at or land passengers on the said wharf, to be paid by the parties owning or employed in working such boat or vessel."

It appears that on the sixteenth of May a boat owned by the defendant and used in ferrying passengers without hire touched several times at the wharf, and that on the same day sixty passengers embarked from the wharf on board the boat. The defendant's counsel contends:—

First, that under this Act the Governor and Council are only empowered to impose rates on vessels using the wharf, and that a boat cannot come under that description of craft, and that, therefore, the order is in this respect void.

Secondly, that the Act gives no power to impose a charge of head-money on the owner of a boat in respect of persons embarking from the wharf into such a boat.

It was strongly contended by the Attorney General that on the purview of the whole of this Act it must be considered the Legislature intended to establish this as a ferry wharf. The rule laid down by Dwarris page 581 is, "that in construing the words of an act, and collecting from them the intentions of the Legislature, the terms are always to be understood as having regard to the subject matter for that, it is to be remembered, will always be in the eye of the framer of the law and all his expressions directed to that end." Now I agree with the Attorney General so far, that if this wharf or any part of it was either by the Act or otherwise shewn to be held peculiarly for the purpose of the ferry, then the Act authorizing the Governor and Council to let and deal with the ferry, and also to make rules and regulations for the management of the wharf so in whole or in part devoted to its use, must be considered to refer to rules and regulations applicable to a wharf used for that peculiar purpose, and would, therefore, empower the Governor and Council to make rules directly prohibiting any boats or class of boats from touching at the wharf, or the part of it devoted to that purpose, or to make any other rules and regulations necessary to prevent the licensee of the ferry being interfered with. But with the exception of the title (which it is expressly laid down forms no part of an Act and is without any legislative import, to which, therefore, the judges in construing an act can pay no regard) there is nothing in the evidence or in the Act to shew that this wharf or any part of it is or ever was devoted to this purpose. The preamble of the Act in speaking of this ferry merely calls it "the ferry over the Hillsborough River opposite Charlottetown, commonly called the Charlottetown ferry," but there is not one word from the beginning

to the end of the Act to shew that the ferry should terminate at this particular wharf, or which could prevent the licensee of the ferry from selecting any other place opposite Charlottetown as the landing place, or to shew that the Legislature intended to devote it to the use of the ferry if the licensee chose to use it. The only thing from which it is argued such an intention can be presumed is, that the same Act which authorizes the Governor and Council to let the ferry and which points out the manner in which it shall be conducted also places the management of this wharf under the control of the Governor and Council, but in doing so the Act expressly names it as "the public wharf at Minchin's Point," and even if it were not so named it would be going beyond all precedent to presume such an intention merely because provisions relating to subject matters having no necessary connexion with each other are contained in the same Act. In determining this question, therefore, we must look on this wharf in the same light as any other public wharf in the Island.

Now where a wharf is erected as a public wharf, or is declared by statute to be so, I understand it to become one of those public things the property of which belongs to the whole country, and the use of which is allowed to all the inhabitants of the country in the way in which such things are ordinarily used, subject of course to such rules and regulations as are necessary to secure to all the enjoyment of that which is intended for the benefit of all, and that the persons or authorities intrusted with its general management and control have no power either directly by positive prohibition, or indirectly by the imposition of rates or burdens, to restrain any individual or class of individuals from using it in the same way as the public generally are permitted to do. Such abridgment of the subject's right or charge on him for exercising it must be illegal, unless the intention of the

Legislature to authorize the imposing it be distinctly and expressly shewn. For in the language of Bayley J. in *Denn v. Diamond* (1). and *Waterhouse v. Keen* (2), "It is a well settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language, and that where there is any ambiguity in the language used the construction must be in favor of the public right." The language of this Act is that the Governor and Council shall have power "to establish the rates of wharfage to be paid by vessels using the same, and to make such other rules and regulations for the management of the wharf as he may think fit from time to time." This is mere general language quite sufficient to empower the Governor and Council to levy equal rates and to make rules and regulations necessary for maintaining the wharf and reserving the proper and convenient use of it to all, but wholly insufficient (according to any authorities with which I am acquainted) to authorize an abridgment of any individual's right to use it, either by express prohibition or by establishing exceptional rates against him.

It is, however, unnecessary to rest the decision in the present case on such general principles. It is a rule in the construction of statutes that "one law shall be compared with other laws made by the same Legislature upon the same subject, or relating expressly to the same point, enjoined for the same reason, and attended with the like advantages;" Dwaris 509. Now by referring to other acts relating to other public wharves in this Island, it will be seen that they all contemplate their being used by the public generally. Thus the 12 Vic. cap. 13, relating to the wharves in Charlottetown, after fixing the rates and duties payable for their support, etc., contains such rules and regulations for their management as will secure the convenient use of them to the public generally without

(1) 4 B. & C. 243 at 245

(2) 4 B. & C. 200, S. C. 6 D. & R. 257.

exception; and the 7 Vic. cap. 15, relating to the Georgetown and other public wharves, contains provisions having a similar object. Now where an act is passed relating to another public wharf, placing it under the control of any public body with power to make rules and regulations for its management, it must be inferred that the Legislature intended those rules should be of a character to secure its use and convenience to every member of the public without exception of individuals or classes, because such is the object which all other statutes on similar subjects evidently have in view. Local circumstances may render it necessary that the regulations should vary in their details from those generally adopted, but in making them the common object of permitting every member of the public to use it must be kept in view, and where that is departed from the power is exceeded. More stringent and particular regulations (and those frequently varied) may be necessary to provide for the public enjoyment of a wharf in or near a city than in a less populous district. It may be found convenient that a ferry boat should land its passengers on it, or that a packet boat should have a berth always ready to receive her; and a regulation directing a certain part of the wharf to be kept clear for the use of such ferry boat or packet, though different from any contained in acts on similar subjects would be perfectly legal, its object being public convenience and the restriction in the use of a particular part applying to all for the benefit of all. But a regulation that a particular packet or any vessel employed in carrying passengers as a packet should not come to the wharf at all, or if it did that it should be subject to an excessive rate beyond other vessels of a similar description would evidently be one of a very different kind. It is impossible to hold that this order is not one of this objectionable character. The charge on the owner of the boat touching at the wharf is a restriction on his right to use it, not applicable

to the owners of other boats, and professedly imposed on him for ferrying passengers without hire which, as the law stands, it is lawful to do. And the payment of head money, though imposed on the owner of the boat, would if enforced prevent boats to which it applies touching at the wharf at all and thereby compel persons wishing to embark in them to resort to some other place of embarkation, though they have a right to use the wharf for embarking in any boat they please. It would, therefore, be as complete an infringement on their right with respect to those boats as if it were imposed on the individuals themselves.

Again confining our attention to the 15 Vic. cap. 34, alone, without referring to the object of other acts on similar subjects, does it authorize a rate on boats? The maxim "*expressio unius exclusio alterius*," or as Lord Bacon expresses it, "as exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated," must apply. Broom, in his Legal Maxims 516, puts as an example of this rule that "where certain specific things are taxed or subjected to any charge, it seems probable that it was intended to exclude everything else of a similar nature." And in *Dewhurst v. Fielder or Fielden* (1), where by Statute 5, Wm. 4, cap. 45, sec. 27, the right of voting in boroughs is given to every person who occupies either as owner or tenant "any house, warehouse, counting-house, shop, or other building, either separately or jointly with any land, within such city or borough occupied therewith by him under the same landlord, of the clear yearly value of not less than £10; it was held that under this section two distinct buildings cannot be joined together in order to constitute a borough qualification. "The rule "*expressio unius exclusio alterius*," observed Tindal C. J., "is, I think, applicable here. I cannot see why the Legislature

(1) 8 Scott N. R. 1013; S. C. 7 M. & G. 182; 9 Jur. 376; 14 L. J. C. P. 126.

should have provided for the joint occupation of a building or land, and not for that of two different buildings, if it were intended that the latter should confer the franchise."

The twelfth section of this Act gives the Governor and Council power to establish rates to be paid by vessels. According to this rule, though all craft coming within the meaning of the term "vessel" were intended to be free of wharfage rate, it cannot be held and was scarcely contended that a boat comes within the meaning of the term "vessel." Indeed the general wharfage Act, 7 Vic. cap. 13, which prior to this Act of 15 Vic. applied to this wharf, and also the Charlottetown wharf Act only imposes rates on vessels over ten tons burden, and as the Legislature must have been aware of this when in 15 Vic. a rate is authorized to be put on vessels we must presume vessels of the same description are meant. Besides the seventeenth section of this Act of 15 Vic. directs the Charlottetown wharfinger to remove vessels and boats which obstruct the approach of the ferry boat. This plainly shews boats were not intended to be comprehended in the twelfth section, because when they are to be dealt with they are specifically warned. Under these words, therefore, a boat is free, and the general power contained in the subsequent part of the section to make other rules and regulations for the management of the wharf cannot authorize a rate on craft which by the words immediately preceding are exempt.

Secondly, can the head money in respect of passengers imposed in this order be recovered from the owner of the boat?

I have already stated why the general words of this Act are not, in my opinion, sufficient to authorize the restriction of the right of every one to use the wharf. But this charge of head money is in reality a rate imposed on the boat because she is there for a particular but lawful purpose, viz., to carry passengers, and seems,

therefore, as unauthorized as the direct charge of two shillings and sixpence for touching at the wharf.

Indeed if the words of the order were even inserted in the Act, it would seem difficult to hold the owner of the boat liable for the head money. Acts, says Mr. Dwarris, "which impose a duty on the public, will be critically construed with reference to the particular language in which they are expressed." The words of the order are, "boat used in ferrying for or without hire passengers, etc, over the said ferry and landing and taking off the same from the said wharf." Now when a boat is lying at a wharf and persons of their own accord go on board, can it be said that the boat takes them off the wharf? The expression might, perhaps, apply to goods taken by the owner or crew from off the wharf and placed in her; but I cannot see how (without drawing very largely on popular meaning) it can be said she takes off persons who come on board of their own accord. And if it be said to mean (which, I think, is its correct meaning) the departing, or going off with them from the wharf after they are on board, there is, evidently, no power to impose such a tax, unless it could be imposed in respect of persons who had embarked in her without using the wharf, for instance, by entering from another boat.

To sum up what I have said. If the wharf be looked at as a public right, the words of the Act are not sufficiently clear and unambiguous to authorize the charge for using it. If we look for the intention of the Legislature by comparing this with other Acts in *pari materia*, it did not intend to authorize its imposition, and if we confine ourselves to the words of the Act alone, it is equally clear that no such rate was contemplated.

Both the Chief Justice and myself have given this case the fullest consideration, and we are both of opinion that the judgment in the Mayor's Court is erroneous, and must be quashed.

MCLEAN V. WHELAN.

Special Jury.—Application to quash panel.—Court will set aside panel for partiality of officer returning it.—Affidavit of party in support of application to set aside must be certain.

Plaintiff applied to quash the Special Jury panel for alleged partiality of the under sheriff by whom it was returned. The grounds of the application were set out in an affidavit made by plaintiff, and were to the effect that plaintiff and defendant were respectively editors of the *Islander* and *Examiner*, the organs of the opposing political parties in P. E. Island, that the action was for a libel on the plaintiff published by the defendant in his paper, that the under sheriff was a violent partizan of the defendant's political party, and had returned forty-three or forty-four out of the forty-eight jurors on the panel from the strong political partizans of the party opposed to the plaintiff. The plaintiff's affidavit was not supported by others, nor was there any affidavit of defendant contradicting it. The defendant's counsel took the objection that there could be no challenge to the array in a special jury case, and, therefore, the panel could not be quashed.

Held, (Peters J.) That though there could be no technical challenge to the array, yet the panel could be set aside on application to the Court, and the application was, therefore, the proper mode of proceeding.

2. That as the grounds on which the plaintiff based his application were stated with sufficient certainty in his affidavit, and there was no rebutting affidavit the application must be granted and the panel set aside, and a new panel returned by the Coroner in the manner directed by the Court.

Rule nisi to quash special jury panel.

Mr. Hensley for defendant shews cause.

Mr. Howe follows.

Mr. C. Palmer *contra*.

Mr. E. Palmer follows.

Cur. ad. vult.

12th July, 1856.

PETERS J. This was an application to the Court to quash the special jury panel for alleged partiality in the under sheriff by whom it was returned. The grounds urged, as

manifesting partiality, are contained in a lengthy affidavit made by the plaintiff; but before noticing them it will be convenient to dispose of an objection taken by defendant's counsel, viz., that no challenge can be made to the array in special jury cases. It is laid down in Archbold's Practice (1), that "it seems very doubtful if the array in special jury cases can be challenged." But it is not to be understood from this that there are no means of raising an objection to a special jury panel for unindifferency, or misconduct in the officer who returns it. On the contrary, in examining the authorities it will be found that the reason why what is technically termed a challenge is not permitted in such cases, is not that such an objection cannot be taken at all, (if such were the case the strange anomaly might be presented of a Court compelled to proceed with a trial, where gross partiality and misconduct in the officer returning the jury was not denied, and where, perhaps, every member of the jury had, confessedly, been nominated by one of the parties); but because in such cases the jury are returned under the authority of a rule of court, with which the Court has always power to deal in a summary manner, according to its discretion, and, therefore, the proper mode of complaining of the officer's misconduct in acting under that rule is by application to the Court. This point is very fully considered in the elaborate judgment of C. J. Abbott, who, in *The King v. Edmonds* (2), after adverting to the authorities and stating the reasons which inclined him to think a challenge to the array of a special jury could not be made, says, "now the nomination of a special jury by the known and general officer of the Court, whether the clerk of the Crown, or the master of the office, or otherwise, is precisely analogous to a nomination by elizors specifically appointed by the Court for the particular purpose; and, as the array cannot be

(1) 424; p. 484 of 12th Edn. (2) 4 B. & Ald. 471.

challenged in the latter case, I am unable to discover any satisfactory reason for saying, in the absence of all practice and authority, that it may be challenged in the former. The reason for disallowing it holds equally in both cases; the Court may be applied to. If there be any reasonable personal objection, known beforehand, the Court will, upon proper application, order the nomination to be made by another officer: if any reasonable objection arises from the conduct of the officer on the particular occasion, the Court, having power over its own rule, at least until everything shall have been completed under it, can reform and correct, and, if necessary, make a new rule for nomination by another officer, or abrogate the rule entirely, and leave the nomination to the sheriff. If the application be not made, or be refused by the Court as unreasonable, it may well be supposed that no reasonable objection exists, especially when it is considered that the party has the power of striking out twelve names." Another reason he observes against allowing them is, that "such challenges might be used for the purpose of delay, and must be tried at the assizes in absence of the person by whom the panel was formed, and consequently, without any opportunity of answer or explanation; whereas the sheriff and coroners are bound by the duty of their office to attend at the the assizes, and in fact almost invariably do so." It must be observed that in England the special jury is named by the master, but the practice here has been (whether warranted by law or not it is not necessary here to enquire) for the sheriff to select and return the panel. That part of the Chief Justice's reasoning against allowing the challenge, that the officer who found the panel would be absent, and could not, therefore, make affidavit in answer, or explanation of charges of misconduct, may not apply here as a reason against even a formal challenge; but the whole tenor of his remarks clearly shews that where the objection cannot be taken as a strict challenge, it may be

taken by application to the Court, which answers the argument urged by the defendant's counsel, that an objection cannot be taken at all.

In Tidd's Practice, 905, it is laid down "that as there can be no challenge to the array for unindifferency of the master of the Crown office, he being an officer of the Court expressly appointed to nominate the jury, the only means in such cases is to apply to the Court, by motion, to appoint some other officer to nominate a jury." Indeed if the plaintiff had gone to trial, and a verdict had been improperly returned against him, and a new trial was moved for, the fact of his omitting to make this application might be used against him in answer to that. Thus in the same case of *The King v. Edmonds* (1), Abbott, C. J., says, "we are all of opinion that the challenge to the array cannot be taken, and as these defendants had two entire terms in which they might have applied to this Court, and forbore to do so, unless their objection could prevail, as grounds of challenge they must be of a very plain and cogent nature to induce the Court to listen to them at this stage of the proceedings for the purpose of a new trial."

The present application being, therefore, the proper mode of raising the objection, we proceed to consider the grounds and substance of the objections.

In Coke Litt., 156 a., it is laid down, "If one or more of the jury be returned at the denomination of the party, plaintiff or defendant, the whole array shall be quashed. So if the sheriff return any one that he be more favorable to the one than the other, the whole array shall be quashed." And in Tidd's Practice, 904, the general grounds of exception to the jury panel are thus stated, "challenges to the array are at once an exception to the whole panel, in which the jury are arrayed or set in order by the sheriff in his return, and they may be made on

(1) 4 B. & Ald. 471.

account of partiality, or some default in the sheriff or his under officer who arrayed the panel. And generally speaking the same reasons that before awarding the venire were sufficient to have directed it to the coroner or elizors will be sufficient to quash the array when made by an officer of whose partiality there is any good ground of suspicion. Also though there be no personal objection against the sheriff, yet if he array the panel at the nomination or under the direction of either party, this is a good cause of challenge to the array." From these authorities it appears that if there be good grounds for suspecting that the sheriff has been influenced in selecting the jury by a desire to favor one of the parties, no matter whether that desire arises from personal favor, personal dislike, political feeling, or any other cause which influence men's actions, the array must be set aside. To sustain the charge of partiality against the under sheriff in this case, the plaintiff, in his affidavit, sets forth that the defendant is the editor of a newspaper called the "Examiner," (which, he alleges, is the organ of the political principles of the present Government) which contains the alleged libel, and that the plaintiff is the editor of a newspaper called the "Islander," which is strongly opposed to the political principles of the present Government; but except so far as it may go to prove that the deputy sheriff's political principles agree with the defendant's, which is amply proved by other allegations in the affidavit, I cannot see what this has to do with the present question, his belonging to one political party or the other is no disqualification for the office. Nor is it any crime to recommend one to a sheriff as a deputy, and if the Government or any member of it did so, or had any understanding with the sheriff on the subject, the presumption is that they thought him a fit person for the appointment. I lay this allegation respecting the under sheriff's appointment, therefore, out of the question, and

as equally irrelevant those of his having been before the grand jury.

The first material allegation in the affidavit is, that out of the forty-eight jurors returned forty-three or forty-four are partizans of the political party opposed to the "Islander" newspaper and to the plaintiff; most of them holding extreme views and having strong political feelings, and many of them being leaders at public elections. It is not easy to define what is meant by a political case, and yet it is not difficult to understand that when the dispute is between two editors of papers which are, respectively, the organs of opposing political parties, and when the cause of the dispute is an alleged libel by one of those editors against the other, there may be a strong desire among active political partizans on the one side for the plaintiff's success, and an equally strong wish on the other for his defeat. We quite agree with the defendant's counsel, that to find persons who had no political bias would, especially in a small country like this, be next to impossible. Mere political bias, or opinion can, it is evident, form no objection, if it did no jury could be empaneled in such a case as the present. But we apprehend there exists a wide difference between opinions resulting from calm and sober reflection which lead men to adopt one set of political principles in preference to another, and that excitement and frequently strong personal hostility which men, even of the highest integrity and honor, who enter the political arena and engage actively in political contests, can seldom avoid feeling. In the one case, few would think it likely they would allow their political feelings to influence their judgment, while in the other, one knows an extraordinary restraint must be put on their feelings if they did not. Now when in a case, which there is reason to believe enlists the feelings of opposing political parties, a complaint is made that the whole panel (with very few exceptions) is composed of persons all on one side, and

holding extreme views, and so actively engaged in political contentions, and that the officer who returned them is an equally violent political partizan on the same side, it does appear to us that these facts if properly substantiated afford very strong ground for suspecting that officer's partiality.

The next material allegation in the affidavit is, that the plaintiff "saith that he has good reason to believe and does believe that the said defendant, or some person on his behalf, hath had some act or part in the selection of the said persons in the said panel, or some of them." There is no doubt from the authorities, if it appears that any individual juror has been returned at the instance or nomination of a party, that fact alone, without anything else, evinces a partiality in the sheriff sufficient to quash the array. The question again arises, is this last charge sufficiently supported by this allegation? and here we must observe that where a party making such a complaint as this plaintiff does, is by his own shewing, an active political leader, or warmly engaged in political contests himself, we should have expected his statements, with regard to the political feelings and opinions of the individuals named in the panel and of whose return he complains, to be supported by something more than his affidavit. We should have expected that (in the language of the affidavit) those credible and experienced persons acquainted with the jurors named, who have examined the lists would have made an affidavit adding the weight of their opinions and knowledge of those individuals to that of the plaintiff, because it is quite possible that political controversy may lead him to attribute more violent feelings to his opponents than they deserve, and under these circumstances had the defendant put in an affidavit even generally denying the material charges alluded to, we should have experienced little difficulty in making up our minds to refuse this application. But no affidavit was produced in shewing cause, and the question,

therefore is, whether the plaintiff's affidavit alone and the mode of allegation adopted in stating the facts is sufficient. The affidavit states positively that from his own knowledge, and as he is advised and believes, forty-three or forty-four of the panel are violent partizans holding extreme views, etc. The certainty and directness with which facts should be deposed to in an affidavit, must very much depend on the particular circumstances of the case and the nature of the facts. In Archbold's Practice (1), it is said "the only general rule which can be laid down is, that the affidavit should set forth all the facts and circumstances necessary to be stated in each particular case explicitly and with certainty, and that where a deponent swears to any fact as within his own knowledge, he must swear distinctly and positively." "Where the fact is not within the deponent's knowledge so much precision is not necessary. Where the deponent states a fact from information, he should, in general, add that he verily believes it to be true. An affidavit that the deponent 'verily believes' is entitled to some credit in the absence of a contrary affidavit." Now looking at the nature of the facts deposed to in this case, they appear to be stated with as much precision and certainty as could be expected. I have already said that we think the plaintiff's statements as to some of the facts should have been supported by other affidavits of disinterested persons. But evidence given, either orally or by affidavit, though at first only of that slight or *prima facie* character which raises a degree of probability in its favor, may become quite strong and satisfactory in consequence of not being rebutted by other evidence, especially where the party against whom it is adduced has the means of refuting it in his power if it be untrue. Thus in 1 Starkie on Evidence, 545, it is laid down "that it very frequently happens that evidence which in itself is but inconclusive, derives a conclusive quality from mere

(1) p. 1445: p. 1620 of 12th Ed.

defect of proof on the part of the adversary. Where a party being apprised of the evidence to be adduced against him has the means of explanation or refutation in his power, if the charge or claim against him be unfounded, and does not explain or refute that evidence, the strongest presumption arises that the charge is true. It would be contrary to all experience of human nature and conduct to come to any other conclusion." It is impossible to look at the charges stated as evidence of the under sheriff's partiality in this case without seeing that the defendant had the means of refutation in his own power. One of those charges is, that the plaintiff has good reason to believe that the defendant, or some one on his behalf, has had some act or part in the selection of the jurors named. Now this is matter particularly within the defendant's own knowledge, alleged in such a manner as, according to the case of *Maton v. Hayter* (1), cited by Archbold, called for an answer, and which, if untrue, he could very easily have controverted. Again, the charge that so large a proportion of the panel is composed of partizans and violent political leaders, was a matter which the defendant could have no difficulty in rebutting if their political character was not correctly described. The under sheriff himself, for his own reputation, would have been willing to contradict it if it were untrue, or offer such explanation as would shew that he was unaware of their violent political prejudices, and, therefore, was actuated by no improper motive. Abbott, C. J., in the case of *The King v. Edmonds* (2), expressly alludes to the duty of the sheriff to answer such a charge when he says, "the sheriff or coroner is bound to attend the Court, and is, therefore, there to answer or explain any charge of partiality or misconduct in selecting the panel." Indeed we can find no case where such a course as this has been pursued in resisting

(1) 3 Jur. 769.

(2) 4 B. & Ad. 471.

a motion made under similar circumstances. In *The King v. Edmonds* the grounds of complaint against the master of the Crown office were of a much less suspicious character than in the present instance. That office in England is always filled by a person of the highest character for learning and integrity, and yet on that occasion we find he makes an affidavit particularly explaining every charge from which partiality in him was attempted to be inferred. Under these circumstances, in the absence of any affidavit to contradict the charges, we are bound to believe that the statements in the plaintiff's affidavit are not capable of being controverted. Then what is the substance of those statements? It is this: that the parties are, respectively, editors of political papers opposed to each other; the action is one for libel, in which the sympathies and feelings of political parties are strongly enlisted; that the defendant has obtained an order for a special jury; that forty-three or forty-four (a number very difficult to believe the result of accident) out of forty-eight persons named in the panel are partizans or violent political leaders on the same side as the defendant; that the under sheriff who selected the panel is himself a violent political partizan on the same side; that the defendant himself, or some person on his behalf, has had some part in selecting some of the persons named on the panel. It is impossible to believe these statements to be true (as under the authorities in the absence of any affidavit to the contrary we are bound to believe) and at the same time allow this panel to stand.

It was urged by the defendant's counsel that the objection to individuals might have been taken as a challenge to the polls. Undoubtedly some of the complaints made against individual jurors, such, for instance, as that he had expressed an opinion beforehand, or a desire to be put on the panel, might have been so taken, and, therefore, in considering the question we have abstained from adverting to them at all. There is,

however, a very strong and positive allegation respecting numbers 10 and 42, viz., that they are quite unfit for any jury by reason of their deep prejudices and low standard of morals which, it is positively stated, are open and notorious. Now though this may be good challenge to the polls, yet if they are openly and notoriously what they are described the under sheriff must have been aware of it, and it is very extraordinary to see them returned on a special jury, and therefore, this fact, taken in connection with the other circumstances, tends to strengthen the suspicions against his impartiality.

In all cases of this kind the Court has power to mould the rule in such way, or to give such special directions as it thinks most likely to secure an impartial selection. Thus in some cases a particular class of individuals, such as shareholders in a certain bank or company, or inhabitants of a certain district, are ordered to be excluded. In one case it was ordered that no persons residing within eight miles of a certain town should be selected. In a small community, where we know party feeling runs high, it may not be easy for any one to select a panel with which one party or other may not be dissatisfied. Accidental circumstances seem to present the means in the present case of avoiding even this. It appears that three special juries have been returned by the same under sheriff in three other cases, of whose respectability and fitness for the duty the Court has had some means of judging from having juries drawn from them empanelled before it at this term. The order will, therefore, be that this panel be set aside and a new one returned by the Coroner, D. Hodgson, Esq., and that in forming such panel he shall place the names of the persons on the special jury panels in the several cases of *McGill v. McLean*; *Kavanagh v. Lydiard*; and *Reddin v. Dingwell*, respectively, on separate pieces of paper in a box, and shall draw forty-eight names from the same,

which shall form the panel, and that the attorneys on both sides shall have notice to attend if they see fit, and the jury be afterwards struck before the Prothonotary in the usual manner.

PLEADWELL V. BRENAN.

Appeal from Mayor's Court of Charlottetown.—Encroachment on streets.—City Council under sec. 50 of Act of Incorporation have not power to open new streets, etc., except by authority of Governor in Council.—Old boundaries.

The 4th Section of the City bye-laws enacted that the City Surveyor should not allow any erection facing on a street to project beyond the line of houses already built, or upon what has heretofore been considered and used as a street, and that when in doubt he should be guided by a plan made by surveyor-general Wright. On that plan defendant's fence was represented as encroaching fourteen feet on Sydney street. The old fence was lately removed and a new one built on the same site, but the fourteen feet had been fenced and held by defendant before and ever since the plan was made. The Act of Incorporation, 18 Vic., cap. 34, by sec. 50, under which the Bye-law was made, gives the City Council exclusive power to open, lay out, etc., the streets and to prevent encroachments, but adds a proviso that nothing therein contained should be construed to authorize the opening of roads, etc., through private property without complying with the provisions of any Act or Acts then in force for awarding damages to any person injured thereby. It was contended that this section gave the City Council supreme power to widen or open streets, and to remove buildings, fences, etc., also that section 4 of the City Bye-laws established Wright's plan as conclusive evidence of the position of the streets, and that anything represented on that plan as an encroachment must be held to be so; also that the lot of which defendant contended the ground in question formed part exceeded the quantity which, according to the deed or grant thereof, it ought to contain, and that his lot should be limited to the quantity described in his grant.

Held, (Peters, J.) That section 50 of the Act did not give the City Council supreme power as contended.

2. That under that section the City Council must apply to the Governor in Council for power to open new streets or to widen the present streets.
3. That the fence was not an encroachment notwithstanding the plan.
4. That disputes respecting old boundaries are not to be decided so much by what would be the metes and bounds contained in

the deed, as by what were the bounds actually laid down by the surveyor acting for the grantor.

Mr. C. Palmer for appellant.

Mr. Recorder Lawson for respondent.

8th January, 1857.

PETERS J. This was an appeal from the Mayor's Court, and is brought to ascertain the construction, and test the validity of the 3rd and 4th sections, cap. 23, of the City bye-laws. The 4th section on which the argument chiefly arises enacts "that until there shall be a survey and plan of the streets of the City established by law, it shall be the duty of the City surveyor, before granting the certificate mentioned in section 3, to be guided by the following regulations, viz., he shall not allow or grant permission for the erection of any house, porch, fence, wall, steps or other erections facing upon the streets of the City to project outside of the line of houses already built, or outside of the nearest houses adjoining right and left, as the case may be, or in and upon what has been heretofore considered and used as the street. If the surveyor shall be in doubt as to the true line of the street he shall be guided by the plan of the streets made by the late surveyor general, George Wright, and kept in the office of the keeper of plans, which plan shall be considered as giving the correct line for all City purposes until the same shall be altered and a new one substituted."

In the year 1833 a survey and plan of the City, alluded to in this section, was made by Mr. Wright. The defendant's fence, which is complained of as an encroachment, is on that plan represented as encroaching fourteen feet on Sydney street. The old fence has been recently removed and the present one erected on the same site. It is not disputed that the fourteen feet now claimed as part of Sydney street before and ever since Mr. Wright's survey has been fenced in and held by the defendant, or

those through whom he claims as their own. It is admitted that the fence agrees with the line of houses in the street on the west, but projects outside the line of houses on the east. There is no evidence to shew that Wright was guided by any original plan in making his survey, or that any old or established boundaries or points of commencement were pointed out to or used by him as the base of his operation. Nor is there anything to shew that the piece of ground in question was ever used by the public as a street, or acknowledged by the owners of the lot to be so.

The evidence of Mr. Smith, the city surveyor, merely goes to shew that assuming Wright's plan to be a correct representation of the City and its streets, the fence is represented as an encroachment of fourteen feet on Sydney street. The only evidence, therefore, of its being an encroachment is that it is represented on the plan to be such.

The 5th section of 18 Vic. cap. 34, which incorporates the City, enacts "that the City Council shall have exclusive power to open, lay out, regulate, repair, amend and clean the streets and alleys of the City, and to prevent the encumbering of the same in any manner, and to protect the same from encroachment and injury by such bye-laws and ordinances as they may from time to time pass." And at the end of the section there is a proviso "that nothing therein contained shall be construed to extend to authorize the opening of any roads or highways through the private property of any person or persons without complying with the provisions of any act or acts then in force providing for awarding of damages to any persons or persons who may be injured thereby."

It was argued by the Recorder that by this section a supreme power is vested in the City Council whenever they see fit to widen the present streets or to open new streets, and to remove any buildings, fences or erections

necessary for that purpose. But it is quite clear the act gives the City Council no such power. The first part of the section authorizes them to open, lay out, regulate, etc., "the streets and alleys" of the city. These words can only apply to the streets existing at the passing of the Act, or which by dedication, user or other legal means may afterwards become streets. But they do not authorize the widening of the present streets, or laying out new streets, or any interference with the private property of the citizens. But it was urged that the proviso at the end of the section, that the act should not extend to authorize the opening new roads without complying with the provisions of the acts for compensating parties injured, contains, to use the Recorder's expression, "a negative pregnant," or in other words, implies authority to open them if compensation is made. There is no rule in the construction of statutes better understood or more uniformly acted on than this, that a power to impose a public burden or interfere with private rights can only be given by plain and positive words, and cannot be conferred by implication or inference. But even if it could there is here no ground for the argument. The first part of the section can by no construction give such power. The proviso (which appears merely introduced by the framer of the act *ex abundantia cautelæ*) says new streets shall not be opened without complying with the provisions of the act in force for awarding compensation to parties injured. What are the provisions of those acts? They all vest the power of opening new roads in the Governor and Council. To comply, therefore, with the provisions of the acts in force for awarding damages referred to in the proviso, the City Council, if they desired to widen a street or open a new one, must, like any other parties, apply to the Governor and Council for authority to do so, before whom the parties to be injured (if they objected) might be heard, and who alone have power to decide whether a proposed

street is so necessary for public convenience as to justify the invasion of private rights.

Secondly, it was urged that by the 4th section of the bye-laws Mr. Wright's plan is established as conclusive evidence of the position of the streets, and, therefore, anything represented on that plan as an encroachment must be held to be so. I do not think the bye-law bears any such construction. It seems simply intended as an instruction for the guidance of the City surveyor, leaving him (where parties really claim a right) to maintain, by the ordinary mode of proof, that any erection he may deem a nuisance really is one. If it can be construed as going further than this, and enacting, as the recorder contends, that Wright's plan shall be conclusive evidence in all such cases, I have no difficulty in saying that, in this respect, the bye-law is *ultra vires* and void,

A power for making bye-laws for the government of the City is, by several sections of the Act of Incorporation, given to the City Council. But those laws must not be repugnant to the common law, nor to any acts of the Legislature. Now, suppose the defendant had been indicted for a nuisance in maintaining this fence, or suppose, on the other hand, the City surveyor, under the orders of the Mayor, had removed this fence and the defendant had brought an action of trespass against the Mayor and surveyor for doing so, by what evidence must the prosecution have been supported in the one case, or the defence be maintained in the other? By giving in evidence the original plan and survey of the town, or by shewing that the part alleged to be encroached on had been used as the street. This would furnish *prima facie* evidence of its being so. But it would be open to the individual claiming the land to shew that it had not been used as the street, or in answer to the evidence of the old plan, to shew that the original plan of the town had, either intentionally or by mistake, been departed from,

and, for that purpose, it would be open to him to adduce evidence that the general line of the houses or fences on the street differed from such old plan, or any other kind of evidence tending to shew that the old survey by which the inhabitants had been guided in making their improvements had, either by the authority of the Government of the day, or through the mistake of the person executing it, departed from the plan, and it would then be for a jury, looking at all the evidence. to say whether the ground in dispute was street or not.

It was also urged that the lot, of which the defendant contends the ground in question forms part, exceeds the quantity which, according to the grant, it ought to contain. But an excess of land beyond the quantity named in a deed or grant is a very common occurrence, attributable, as all experienced in litigation respecting lands in this Island are aware, to inaccuracies in the original surveys, and usually raising a very slight presumption against the occupier. The true inquiry in all disputes respecting old boundaries being not so much what would be the precise metes and bounds of the premises according to the description contained in the deed or grant, as what were the grounds actually laid down by the surveyor, acting either for the Crown or an individual grantor in laying off the land. And where a grantee takes possession under such a survey, and holds and improves for a length of time to the bounds so laid down, his title to the premises comprised within them cannot be disputed, although the whole may not correspond with the description, or exceed the quantity mentioned in his deed or grant. If an error in boundaries so established were allowed to be rectified long after the party had taken possession, and improved on the faith of their correctness, the most valuable improvements might be lost and ruinous consequences result to individuals.

This principle is well illustrated in the case of *Doe*

dem Carr v. McCullough (1), decided in the Supreme Court of New Brunswick. In that case one hundred acres were conveyed and the description was as follows: "Beginning at the south west corner of the said Lot No. 10, and running in a northerly direction upon the dividing line between vacant land and the Lot No. 10, forty rods thence in an easterly direction, preserving the same front to the rear of the said Lot." In 1820 the division line was, by consent of the grantee of this lot and the adjoining owner, run by one Fisher, a deputy surveyor, the parties intending that it should be run according to this description, and for many years the parties uniformly acquiesced in and acted upon the line so run by Fisher. In 1840 the lessor of the plaintiff caused a new survey to be made, when it was found that the defendant's lot was much wider in the rear than in front, being at one place fifty-eight rods and in the extreme rear sixty-one and a half rods wide, instead of forty rods as expressed in the deed, and it seemed that Fisher had diverged from the true course after passing a pond which lay in the range of the line. The judge told the jury that if on the evidence they were of opinion that Fisher's survey was made by the authority of the plaintiff, and had been acted on for a number of years, he would be bound by it, and if they were not satisfied of this, then, according to the terms of the deed, the plaintiff was entitled to a verdict for the fifty acres, being the quantity of overplus held by the defendant. The verdict was for the defendant, and on a motion for a new trial the direction was held right. Chief Justice Chipman, in his judgment, says, "the principle involved in this instruction of the learned judge to the jury has always been hitherto acted upon in this Province in cases of this sort, and I would be very unwilling to depart from it. It, undoubtedly, operates as a species of *estoppel in pais*, and is, I conceive, founded on the strongest considerations of public convenience,

(1) 1 Kerr 460.

and good policy in the loose and uncertain condition of boundaries which prevails throughout the Province. There was express authority to run the line by Fisher, and the lessor of the plaintiff has adhered to it for a period of nearly, if not quite, twenty years. On the face of this conduct of the lessor of the plaintiff, the other parties acted in holding possession and making improvements up to the line on their side. To disturb their present enjoyment of the land would, I think, be doing injustice to them and be attended with very injurious consequences as a precedent." And Carter, J., before whom the case was tried, says, "I have seen no ground for changing the opinion I expressed at the trial of this cause. I have always considered the principle which I then laid down to the jury as one long settled in this Province, originally founded on the circumstances and almost the necessities of the country, and now so repeatedly sanctioned as almost to become part of the common law of the country. The great amount of difference in this case between the two lines appears to me the only new feature in it. But once admit the principle and it must equally prevail whether the difference be two rods or sixty. That the general effect of this principle is good and beneficial no one who has had much experience in the litigation of boundaries can, I think, deny, and if we once give up this rule there are few boundaries which the ingenuity or ignorance of surveyors might not throw into doubt or dispute. And all such questions would, probably, be tried by the comparative multitude of surveyors which either party could procure to favor his interests."

If this principle applies to the boundaries of wilderness land, how much stronger is the reason for applying it to towns and cities where an error of a few feet may often interfere with property of great value. It is true in the case cited the principle was applied to a line run between two individuals, but I see no reason why it is not equally

applicable in a dispute respecting the boundary of a street.

In laying off a town the side of each street forms the boundary between it and the lots fronting on it. The surveyor executing the original survey acts on behalf of the Crown, and if he through mistake lays out a street narrower than was intended, or departs from the straight line or precise course he should have run, and the individuals settling on the lots hold and improve either by building or fencing up to the line so erroneously laid out, the injury is the same whether an occupier loses his improvements in front under a claim of street, or on the side under the claim of his neighbor. The reason for the application of the principle is the same in both cases, and must, I think, operate with equal force to stop both the Crown and the public from afterwards rectifying the error, even though the description in the grant should shew that there was one.

The case is an important one in consequence of the multiplicity of interests involved in the questions which have been raised during its discussion, and it has been forcibly argued by the learned Recorder in the only way it could be put; but for the reasons I have stated I cannot concur in the arguments he has adduced. The consequences which would result from their adoption never could have been intended. It is a principle of British law that no man shall be deprived of his possession except by the verdict of a jury. To adopt the arguments of the Recorder I must suppose the Legislature intended to give the City Council power to deprive the citizens of this privilege in questions of this sort. Because if Wright's plan is to be taken as conclusive evidence everything represented on it as an encroachment must be held to be such, and it would then be useless for an occupier to appeal to a jury, who would be bound to return a verdict in accordance with the plan. Thus a person

might be dispossessed of land he had occupied for fifty or sixty years, or, indeed, any length of time, merely because this modern plan represents it as part of the street.

It is unnecessary to advert to the argument that under the bye-law the party might keep up a fence or other erection made before Wright's survey, and is only prohibited from erecting another when that is removed, because if the occupier's title to the land is valid the City Council could not prevent his erecting a house, fence, or anything he pleased upon it. And if it was not he could not maintain them though previously erected.

The Act gives the City Council ample power to prevent nuisances on what has been heretofore used as a street, and for that purpose Wright's plan (if properly authenticated) might be valuable evidence, and the 23rd cap. of the bye-laws looked at as a code of instructions for the guidance of the City surveyor is, probably, as judicious as, under the circumstances, could have been framed. But the Act of Incorporation gives the City Council no such power, as from the construction attempted to be given to the bye-laws, they would appear to claim.

The judgment of the Mayor's Court must be reversed.

IN CHANCERY.

1857.

HOWATT V. LAIRD.

Injunction.—Penning back water.—Riparian rights.

An injunction will lie for injury to right of riparian owner, without actual damage being sustained so as to preserve the right, but in interfering in such a case the Court will consider not only the strict legal rights of the parties, but all the surrounding circumstances, the injury the strict enforcement of the right would cause the defendant, etc. An injunction had been granted some years before, restraining the defendant from penning back the water for his mill, which was above plaintiff's on the same stream, between the hours of 4 a. m. and 11 p. m., each day. It now appearing that to allow defendant to pen back the water between the hours of 10 p. m. and 6 a. m. would not injure plaintiff's right, the Court ordered the injunction to be dissolved so far as it related to penning back the water between these hours, but that with respect to all other times it should be made perpetual.

For the facts in this cause see *Howatt v. Laird* (1).

PETERS, M.R. The injunction which has been granted in this case is an injunction to restrain the defendant from penning back the water, or interrupting the flow of the stream between the hours of four o'clock in the morning and eleven at night of each day. The plaintiff is the owner of certain mills on the lower part of the stream, and the defendant, of other mills higher up, and the plaintiff complains that in consequence of the water being penned back by the defendant for the use of the upper mill, its regular flow to his mill is interrupted; that he brought an action in the Supreme Court against the defendant and one Benjamin Crew and recovered a verdict for nominal damages of 1s., on which verdict judgment was, after argument, given for the plaintiff, on the ground that it was an injury to his right. The bill further states that, since such judgment, the defendants have been in the habit of penning back the water so as to impede the working of the plaintiff's mill and thereby damaging his

(1) Ante p. 7 & p. 21.

business. Numerous witnesses have been examined on both sides, but as the material facts elicited are substantially the same as were stated in the affidavits used on the motion to dissolve the injunction in 1851, and to which, in the decision then given, I adverted at some length, I do not think it necessary particularly to refer to them on the present occasion any further than to say that after a careful perusal of all the evidence now adduced I come to the same conclusion as I did then, viz., that the defendants were in the habit, and claimed a right, of interrupting the natural flow of the stream for considerable periods of time, at such time as suited their convenience for the purpose of raising a head of water for their mill. Neither shall I now enter into an examination of authorities which, on the argument in the Supreme Court, as well as on the occasion alluded to, I reviewed at considerable length. The principal authorities then adverted to were 3 Kent's Com. (1); *Greenslade v. Halliday* (2); *Greaves v. Burbury*, *Tyler v. Wilkinson* (3); *Sackrider v. Beers* (4); *Shears v. Wood* (5); *Howard v. Wright* (6); *Bealey v. Shaw* (7); *Mason v. Hill* (8); *Wood v. Waugh* (9); *Williams v. Moreland* (10), *Hanson v. Gardiner* (11); *Crowder v. Tinkler* (12); *Attorney General v. Hallett* (13); *Coulson v. White* (14); *Attorney General v. Nichol* (15); *Wynstanley v. Lee* (16); *Attorney General v. Eastern Railway Company* (17); *Thomas v. Oakley* (18); *Webb v. Portland Manufacturing Company* (19); *Smith v. Clay* (20). The cases of *Dickieson v. The Grand*

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| (1) 440. | (10) 2 B. & C. 910. |
| (2) 6 Bing. 381. | (11) 7 Ves. Jun. 305. |
| (3) 4 Mason 397. | (12) 19 Ves. 617. |
| (4) 10 Johns. Rep. 241. | (13) 16 M. & W. 568. |
| (5) 7 Moore 345. | (14) 3 Aitk. 21. |
| (6) 1 Sim. & Stu. 190. | (15) 16 Ves. 338. |
| (7) 6 East 208. | (16) 2 Swanston 333. |
| (8) 3 B. & Ad. 304. S. C. 5 B. | (17) 7 Jur. 806. |
| & Ad. 1. | (18) 18 Ves. 184. |
| (9) 13 Jur. 742. S. C, 3 Ex. | (19) 3 Sumner 189. |
| 748. | (20) 3 B. C. C. 639. |

Junction Canal Company (1); *Embry v. Owen* (2), and *Wood v. Sutcliffe* (3), have occurred since the previous occasion on which I had to consider this case.

The general law on this subject is stated in *Embry v. Owen* (2), to be correctly laid down in the following passage from Kent's Com. : "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him unless he has a prior right to divert it, or to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along, '*aqua currit et debet currere*' is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back on the proprietors above without a grant or an uninterrupted enjoyment of twenty years which is evidence of it. This is the clear and settled general doctrine on the subject, and all the difficulty that arises consists in the application. The owner must so use and apply the water as to work no material injury or annoyance to his neighbor below him who has an equal right to the subsequent use of the same water. Streams of water are intended for the use and comfort of man, and it would be unreasonable and contrary to the universal sense of mankind to debar every riparian proprietor from the application of water to domestic, agricultural, and manufacturing purposes, pro-

(1) 7 Ex. 282: S. C. 16 Jur. 200. (2) 6 Ex. 353. S. C. 15 Jur. 633.

(3) 16 Jur. 75.

vided the use of it be made under the limitations which have been mentioned, and there will, no doubt, inevitably be in the exercise of a perfect right to the use of the water some evaporation and decrease of it, and some variation in the weight and velocity of the current. But *de minimis non curat lex* and a right of action by a proprietor below would not, necessarily, flow from such consequences, but would depend on the nature and extent of the complaint or injury, and the manner of using the water. All that the law requires of a party, by or over, whose land a stream passes, is that he should use the water in a reasonable manner and so as not to destroy, or render useless, or materially diminish, or affect the application of the water by the proprietors below on the stream. He must not shut the gates of his dam and detain the water unreasonably, or let it off in unusual quantities to the annoyance of his neighbor. Pothier lays down the law very strictly that the owner of the upper stream must not raise the water by dams so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below. But this rule must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietor. It must be subjected to the qualifications which have been mentioned, otherwise rivers and streams of water would become utterly useless either for manufacturing or agricultural purposes. The just and equitable principle is given in the Roman law, '*Sic enim debere quem meliorem agrum suum facere ne vinci deteriore faciat*'."

As observed by the learned judge in *Embry v. Owen*, (1) it is very difficult, perhaps impossible, to define precisely the limits which separate the reasonable and permitted use of a stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not. Now it appears to me that where (as in this case) the owner of an upper

(1) 6 Ex. 353; S. C. 15 Jur. 633.

mill on a stream, the natural momentum of which is not sufficient to work it, pens back the water, not at any particular time, but just as suits his own convenience, it cannot but be more or less prejudicial to the mill lower down, as it must render the owner of the lower mill uncertain at what time he may have water to drive his mill. It is true, I find in a case of *Hetrick v. Deachler* (1), decided in Pennsylvania, and cited in Angell, page 122, where the plaintiff gave in evidence, "that the defendant withheld the water three, four and five days, and at one time thirteen days, and that at times he discharged the water in such quantities as to flood the plaintiff's mill. The defendant, on the other hand, gave evidence to show that when he detained the water the stream was low and the season very dry, and that without the detention he could not saw at his mill; that he only used the water for his saw mill and for the purpose of watering his meadow; that the water was turned into its natural course before it left his premises; that the stream was a small one and insufficient for both mills." The judge left it to the jury to say whether a detention at times of three days, at other times of five days, and at one time of thirteen days, in the defendant's dam, to the injury of the plaintiff's mill, was longer than was necessary for the defendant's proper enjoyment of the water at his mill as it passed through his land, and if they believed that it was longer than necessary to find for the plaintiff, and if not, to find for the defendant. I am unable to reconcile this decision with the principle laid down in all the English cases, and with the tests as to the reasonableness of the detention laid down by Judge Story in the much quoted case of *Tyler v. Wilkinson* (2). He says, "there may be, and there must be allowed, of that which is common to all, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not. There may

(1) 6 Barr 82.

(2) 4 Mason 397.

be a diminution in quantity, or a retardation, or acceleration of the natural current indispensable for the general and valuable use of the water perfectly consistent with the use of the common right. The diminution, retardation, or acceleration not positively and sensibly injurious, by diminishing the value of the common right is an implied element in the right of using the stream at all." Now can it be said that an entire cutting off of the natural flow of the stream, and detaining the water for three days, or one day, is not a retardation positively and sensibly injurious to the common right? That common right is the use of the momentum or power of the stream for the various purposes to which it is applicable, some of which require a constant application of its power. Is it possible that a total interruption of its flow for three days, or one day, would not be injurious to persons so using it? Is the carding mill, the fulling mill, or the turning lathe to stand idle because the saw mill higher up requires three days' or one day's accumulation of water to drive it at all? In *Shears v. Wood* (1), the upper proprietor erected a dam and detained the water from the plaintiff's copper mills, and it being proved that copper mills require a constant supply the action was held to lie. And if an action would lie by the owner of works requiring such constant supply, it might likewise be maintained by one who had not as yet applied the water to any particular use to preserve his right to do so. This is clearly laid down in *Wood v. Waugh* (2), and Angell, (3), page 466, after citing *Parker v. Griswold* (4), where, in an action for diverting a watercourse, it was held that a sufficient cause of action was shewn, although the declaration did not aver the existence of any mill, or other works of the plaintiff on his land for the operation of which the water so diverted was needed, says, "it may, in short, be said to be an elementary principle of law

(1) 7 Moore 345.

(2) 13 Jur. 742.

(3) Sect. 432.

(4) 17 Conn. 288.

that wherever there is a wrong there is a remedy, and that every injury imports damage in the nature of it—and that if no other damage be established the party injured is entitled to nominal damages. This principle applies more strongly where there is not only a violation of the plaintiff's right, but the defendant's act, if continued, may become the foundation, by lapse of time, of an adverse right, and hence actual perceptible damage is not indispensable as the foundation of an action. And with regard to the rights of riparian proprietors on a water-course, it is abundantly well established that the law tolerates no further inquiry than whether there has been a violation of right. If that appears the party is entitled to nominal damages at least."

On powerful streams disputes are not likely to arise, as the detention of the water must be so temporary as not sensibly to interfere with the rights of others to use it for any permitted use they may choose. But if a riparian owner can erect and use works so disproportioned to the power of the stream as to require a total penning back of the water for three days, or two days, or one day, to enable him to drive his works for another, those lower down would have the user of the water, not as a common right, but in submission to him above, and must always be restricted in their enjoyment of it, in proportion as the upper owner might require a greater or less quantity to derive the greatest profit from his works, and the owner of machinery requiring less water, and, therefore, better adapted to the power of the stream, would be sensibly injured, as the stoppage must prevent his working so continuously as he otherwise might have done. That machinery must be adapted and the user of the water proportioned to the power of the stream appears to me a principle deducible from all the cases, and particularly illustrated in the decision of *Embry v. Owen* (1), where the defendant was allowed to use the water to irrigate his

(1) 6 Ex. 352.

land because the irrigation was not continuous, but only at intermittent periods when the river was so full that the diminution of the water was not perceptible to the eye, and no damage was thereby done to the working of the defendant's mill. Had the irrigation taken place at times when the river was not full, and when it would have caused a perceptible diminution of the volume of the stream, no doubt the plaintiff would have recovered.

From all the evidence in this case it is clear that the defendants were in the habit of penning back the water at such times as their own convenience or the necessities of their mill required them to do so. It is true the interruptions were chiefly during the night, but there is ample evidence to satisfy me that they sometimes occurred during the day. Now although the interruptions took place chiefly at night yet the occasional penning back the water in the day under an assertion of right to do so (which was evidently the case here) would, after twenty years, ripen into a right to pen it back by day or night as they chose, and as the acquirement of such a right must be injurious to the right of those below, the plaintiff was, no doubt, entitled to nominal damages.

It was urged by the defendant's counsel that the injuries here could be compensated in damages, and that, therefore, the plaintiff should be left to bring actions at law for the infringement of his right. But the principle on which Courts of Equity act in cases of this kind is, that if the injury caused by the diversion or interruption is frequently recurring, or the right to continue it is set up and persisted in by the defendant, in a bill for an injunction the Court will interfere effectually to protect the complainant. In Angell, section 449, the equitable doctrine on this point is so perspicuously stated that it may be well to cite it at length. He says, "We have seen that an action on the case may be maintained for the diversion of a watercourse, or for making back-water,

even although no actual damage is thereby occasioned, on the ground of the injury done to the right of the riparian proprietors affected and the acquisition of an adverse right by the uninterrupted enjoyment of the diversion, etc., for twenty years. On the same ground a bill in equity may be maintained in such cases for an injunction, though there are some few cases in which it seems to have been considered, that as against a riparian owner seeking to erect an improvement on his own land, the complainant is bound to shew that his superior rights will be, not probably, but really and sensibly affected. The weight of authority is, however, decidedly different. In a bill in equity for an injunction by the plaintiff to prevent the defendant from diverting a watercourse from the plaintiff's mill, the general doctrine is thus stated by Judge Story : 'If no action were maintainable at law without proof of actual damage, that would furnish no ground why a Court of Equity should not interfere and protect such a right from violation and invasion ; for, in a great variety of cases, the very ground of the interposition of a Court of Equity is that the right can only be permanently preserved or perpetuated by the powers of a Court of Equity. And one of the most ordinary processes to accomplish this end is by a writ of injunction, the nature and efficacy of which, for such purpose, I need not state, as the elementary treatises fully expound them. If then the diversion of the water complained of in the present case is a violation of the right of the plaintiffs, and may permanently injure that right and become, by lapse of time, the foundation of an adverse right in the defendant, I know of no more fit case for the interposition of a Court of Equity, by way of injunction, to restrain the defendants from such an injurious act. If there be a remedy for the plaintiffs at law for damages, still that remedy is inadequate to prevent and redress the mischief. If there be no such remedy at law, then, *a fortiori*, a Court of Equity ought to give its aid to vindicate and

perpetuate the right of the plaintiff's. A Court of Equity will not, indeed, entertain a bill for an injunction in case of a mere trespass, fully remediable at law. But if it might occasion irreparable mischief, or permanent injury, or destroy a right, that is the appropriate case for such a bill."

But in interfering in such cases the Court will have regard not only to the strict legal rights of the parties, but to all the surrounding circumstances; to the injury, the enforcement of the strict legal right will occasion to the defendant, as well as the benefit its preservation will secure to the plaintiff. It will not hesitate to protect the plaintiff in his strict legal right where that is necessary to secure him a reasonable use of the water, but it will refuse to interfere where the infringement complained of causes no practical damage to the plaintiff, and where the insisting on it will be ruinous, or highly injurious, to the defendant. The attention of the Court in all such cases must be directed to ascertain what is necessary to be done to secure to each party a fair and reasonable participation of the common privilege, and to endeavor to mould its decree so as to effect that and nothing more.

I am glad to find that the order in the present case has nearly effected this, as I perceive the defendant states in his answer, and it is also asserted by his counsel at the bar, that since 1851 he has conformed to the time allowed by the injunction, and yet has had sufficient water to work his mill. According to this statement the defendant now has all the use of the water that is reasonably necessary for his mill. But I am not disposed to lay hold of a particular expression of either party to impose a restriction greater, than from all the circumstances of the case, appears necessary to secure to each a fair participation of the common privilege. The defendant says that since the granting of the injunction he has penned back the water only from eleven to four, and yet has had sufficient

to work his mill. The plaintiff and some of his witnesses say the defendant must pen back the water for sixteen hours to enable him to grind seven or eight hours. Here is a great discrepancy. I shall not attempt, nor is it necessary I should reconcile it. The truth, very likely, is that each party has been more anxious to adapt the facts and stretch his opinions to support his own side of the controversy than to state the exact facts of the case. The point I have to attend to is not in how short a time the defendant can accumulate water to enable him to work his mill, but what restriction it is, under the particular circumstances, necessary to impose upon him to prevent his injuring or acquiring a right to do what would be injurious to the plaintiff's right. Now looking at all the evidence relating to the power and peculiarities of this stream, I am satisfied that the time allowed the defendant for penning back the water may be extended without doing any practical injury to the plaintiff's right. From the evidence now adduced for the defendant it appears that there are one or two springs in the plaintiff's dam, and also several small tributaries emptying into the stream below the defendant's mill, and that, from these sources, even when the water is stopped at the upper mill, a considerable accumulation takes place in the plaintiff's dam during the night. Now I wish here to guard myself against being understood to say that these circumstances would give the upper owner any legal right to cut off the water, or use it in a different manner from what he would have been entitled to do if no such tributaries below him had existed. In other words, I do not conceive it would be any defence to an action against the upper owner to say there are feeders below my mill which yield sufficient water for yours, and therefore, I have a right to detain the water at my mill as long as I choose. Every riparian owner has a right to have the whole volume of the water, from the source of the stream to his land, flow in its natural course without

essential diminution or detention, and can maintain an action at law against any one who causes any such essential diminution or detention. But where application in such cases is made to a Court of Equity for an injunction, it, as I have shewn, acts on very different principles; it cannot restrain the plaintiff from insisting on his strict legal rights, neither is it bound, nor will it assist him in a churlish enforcement of them against a slight infringement which cause him no practical damnification; and as the interference of the Court at all in these cases, and the extent to which it does interfere, depend on the particular circumstances of each case. Circumstances of this kind are here entitled to consideration, and coupled with the plaintiff's remark to Lowther and Clark, in 1844, shew that a further extension of the time for penning back the water may be properly made. From all the facts of the case, now fully laid open, I think that extending that time from ten o'clock at night to six o'clock in the morning will probably benefit the defendant without at all injuring the plaintiff's right.

With respect to costs, as the plaintiff was correct in bringing this suit he is clearly entitled to the costs up to the hearing of the motion to dissolve the injunction in 1851; but I think he should have been content with that order, and, therefore, I shall not allow him costs subsequent to that event.

The order, therefore, is that the injunction formerly granted in this case, so far as relates to restraining the defendants, their servants, etc., from penning back the water, or interrupting the natural flow of the stream between the hours of ten o'clock at night and six o'clock in the morning of each day, be dissolved, and that with respect to all other times it be made perpetual. And further, that the defendants do pay to the plaintiff his costs of this suit up to the hearing of the motion to dissolve the injunction in 1851, including the costs of

such hearing and of the service of the order then made, but no further, to be taxed by Mr. Forgan, one of the Masters, etc.

THE QUEEN V. COX.

Fishery reserves.—Construction of term “high water mark on the coast” in Township Grants.

The original grants of townships reserved to the Crown five hundred feet from “high water mark on the coast” for the purposes of the fisheries. Under this reservation the Crown claimed sixty-nine acres fronting on St. Peter's Bay, and sixty-nine acres on the Morell River, in which the tide ebbs and flows. A verdict for the Crown was found for the whole. A rule *nisi* for a new trial was granted on the ground, amongst others, that the reservation clause only applied to land fronting on the open sea, and not to that fronting on tidal rivers. It was contended that the employment of the word “coast” limited the reservation to land fronting on the open sea; also that in construing the grant regard must be had to the purpose for which the reserve was made, and as it would be of no use for the purpose intended in a tidal river, it could not have been meant to apply to such river.

Held, (Peters, J.) That the clause only applied to land fronting on the open sea.

The Attorney General for the plaintiff.

Mr. Edward Palmer for defendant.

9th March, 1858.

PETERS, J. This was an information filed by the Attorney General for intrusion on land called the fishery reserve. The *locus in quo* is situated partly on the shore of St. Peter's Bay and partly on Morell river, and forms part of Townships 39 and 40. In 1769 these Townships were granted to Spence & others and Fraser, and in each of these grants is contained the following clause of reservation: “And further saving and reserving for the disposal of His Majesty, his heirs and successors, five hundred feet from high water mark on the coast of the tract of land hereby granted, to erect stages and other necessary buildings for carrying on the fishery.” Under this clause the Crown claims sixty-nine acres fronting on the bay, and sixty-nine acres on the Morell river, in which the tide ebbs and flows.

On the trial the jury were directed that under this reservation the land fronting on the bay was excepted and belonged to the Crown, but that fronting on the river was not excepted and passed to the grantee. The jury, notwithstanding, found for the Crown for the whole.

The point now to be decided is, whether the sixty-nine acres fronting on the Morell river is embraced within the reserve. As many of the grants of Township lands in the Island contain a similar reservation, the decision of the question thus raised is one of considerable importance.

In legal construction the term "sea shore" applies to all land over which the ordinary tides flow and reflow, and as, under that definition, wherever a high water mark exists the "sea shore," in contemplation of law, extends, if the words "high water mark," in these grants, are construed as designating both the "sea shore" along which the reservations were to extend, and also the point on the shore from which the five hundred feet is to be measured, the land fronting on this tidal river would be clearly comprised within the reservation. But the construction of grants, like other instruments, depends on the intention of the grantor, and a knowledge of the nature or peculiarities of the subject matter of the grant is, sometimes, essential in order to ascertain the sense and meaning in which particular words are intended to be used. The reservation in the grants in question is expressed to be made for the purpose of enabling His Majesty to dispose of the lands reserved for a particular purpose, viz., to erect stages and other necessary buildings for carrying on the fisheries. The object in making this reservation, evidently, was to promote and encourage the development of a great source of national wealth by affording facilities and conveniences to those who might embark in the fisheries. Along the coasts, on the open sea, and also in the bays of this Island, very valuable cod and other fisheries exist, in prosecuting which stages and other buildings, covering a considerable extent of ground,

are necessary; and on those shores, therefore, such a reservation might prove a valuable privilege to fishermen. But the rivers corresponding to the size of the Island are on a diminutive scale, while, from the general formation of the country, the tides ebb and flow many miles up all the rivers and almost to the source of many others. We cannot be ignorant of what every one in the country knows, that no fisheries exist in those rivers of a description to require any such extensive reservations for the erection of stages or other buildings in which to carry them on. In fact, in such situations the reservation for fishing purposes would be useless. We must not assume the Crown to have been ignorant of the nature of the country it was granting away, and it seems to us that under such circumstances, the clause reserving a certain space from high water mark on the coast for the purpose of carrying on a fishery must have been intended to apply only to those parts of the Townships popularly known as coast, viz., the shores of the open sea and the bays and inlets of the sea along which only any fisheries existed, for which such reserves could be necessary; and that it could not have been meant to extend to rivers where a large extent of ground would then be appropriated to a purpose for which it could be of no practical use.

But it appears to us, without drawing on our local knowledge of the country, the language of the reservation itself when taken altogether, will not bear so extensive a construction as is contended for. The words of the reservation are "five hundred feet from high water mark on the coast of the tract hereby granted." Now if the reservation was intended to extend to all tidal rivers, or to every place where the tide ebbed and flowed, why was the word "coast" used? since the words five hundred feet from high water mark would have extended to all places where a high water mark could be found. If, therefore, the words "on the coast" were not intended to confine the description of the premises reserved within narrower

limits than the words "high water mark" would have done, they seem to us to have no meaning, or at most, are mere surplusage; but in construing an instrument no words should be rejected if a sensible interpretation can be put upon them. The term coast, in its popular sense is, we believe, applied to the land fronting on the open sea, or inlets off the sea, or bays, but is never applied to that fronting on rivers. And taking the word in that sense it appears to us, evidently, used to contradistinguish high water mark on what is popularly called the coast from high water mark on the rivers, and to limit the reservation to the former, and prevent its extending to the latter.

On these grounds we think the land fronting on Morell river is not included in the reserve, but passed to the grantee.

Another ground on which a new trial is moved for is, that the verdict is contrary to the evidence in finding for the whole five hundred feet, whereas a considerable portion of it was proved to have been washed away by encroachment of the sea. There is no doubt that the verdict is contrary to the evidence in this respect. That the sea had encroached to a considerable extent was proved beyond all question, but the evidence as to the extent of that encroachment was conflicting. Some of the witnesses estimated it on the average at one foot, and others at four feet per annum. It was admitted by the Attorney General that whatever part of the five hundred feet had been so lost must be deducted. The jury, however, found for the whole.

On both these grounds, therefore, we think the rule for a new trial must be absolute.

Several other points were raised, but as they were disposed of during the argument it is unnecessary now to advert to them.

Rule absolute.

COMPTON V. CROSSMAN.

Replevin.—Deed.—Grantor using same seal as notary attesting instrument.—Dower.—Rent.—Variance.

C. claimed as heir. The deed to his father was executed in France before a notary, whose seal was affixed at the bottom of the deed opposite both his own and the grantor's names, and there was no other seal. It was objected that this was not the grantor's seal, and that, therefore, there was no deed and no estate under it to descend. It was also objected that C.'s mother was entitled to dower, and that C. was only entitled to two-thirds of the rent, and having avowed for the whole there was a variance. The rent reserved was £5 a year and a ton of hay, and the averment only alleged the money to be due without acknowledging satisfaction for the hay, and it was contended that this was a variance.

Held, (Peters, J) That the seal was sufficient, and that more than one person might lawfully use the same seal.

2. That there was no variance on account of the dower, as, until assignment, the heir was entitled to receive the rent.
8. That the omission to acknowledge satisfaction for the hay was not a material variance, and if it were it should have been taken advantage of by special demurrer.

29th October, 1859.

Motion to set aside a verdict given for defendant, and to enter verdict for plaintiff or for a new trial.

Mr. T. Stewart shews cause.

Mr. E. Palmer, *contra*.

3rd January, 1860.

PETERS, J. This was an action of replevin. The avowant claims as heir and it is objected,

First. That the deed to avowant's father has no seal, and, therefore, he had no estate to descend to avowant. The deed, which is for a valuable consideration of £200, was executed in France, and is certified by a French notary on the back under his seal. The same notary is also an attesting witness, and the same seal used by him to his certificate on the back of the deed, is affixed at the bottom of the deed opposite his name, and also opposite the grantor's signature. It is clear that no

instrument can be considered a deed unless sealed. But the law does not require the seal to be of any peculiar material or of any particular form. Thus it is laid down 4 Cruise. Dig. 28, "that if a party seal a deed with any seal beside his own, or with a stick or anything else, it is equally good." So it was determined in Virginia that a scroll used as a seal constituted a good bond (1). The grantor might, therefore, use the notary's seal. But it was urged here that from the position of the signatures it was evident that the seal had been placed by the notary after his signature as a notary attesting an instrument. From examination of the instrument I cannot say that such was the fact. But admitting it to have been put there by him for that purpose, that would not prevent the grantor from treating and adopting it as his seal also, and so making the one seal serve as the seal of two distinct parties. Cruise, Dig. 28, says, "It is not necessary that there be for every grantor who is named in the deed a several piece of wax, for one piece of wax may serve for all the grantors who are named in the deed if every one of them put his seal upon the same piece of wax, or if another do so for them if the words of the deed imply so much, that is, if it be said in the deed *in cujus rei testimonium*, etc., or words to that effect." Now here the attestation clause states that the grantor has signed, sealed, etc., and there being a seal, which would be sufficient if the grantor chose to use it as such, we cannot disbelieve the declaration in the deed under his signature that he did so. I think, therefore, that the deed is sufficiently sealed.

Secondly. It is objected that the avowant's mother is entitled to dower, and, therefore, the avowant is only entitled to two-thirds of the rent, and having avowed for the whole there is a variance. But until dower is assigned a widow cannot enter into the land. Thus Kent says, "The widow cannot enter for her dower until it be

(1) 2 Tucker's Bl. Com. 304.

assigned her nor can she alien it so as to enable the grantee to sue for it in his own name. It is a mere chose in action and cannot be sold," 4 Kent's Com. 41. And by Abbott. C. J., in *The King v. Inhabitants of Northweald Bassett* (1), "Before assignment the widow hath neither legal nor equitable estate in the land." Neither can she recover arrears of profits or damages except from the time of the demand. The reason assigned for which in Coke Lit. 33, A. is "because the heir holdeth by title and doeth no wrong till a demand be made, and she cannot demand it from a tenant for years, but only from a tenant in fee. Barton, Convey, 258, 278. And though after assignment she is in of her own estate and considered to hold from the death of her husband, yet, if between his death and the assignment, the heir has received rents from a tenant of premises afterwards assigned for dower she may compel the heir to account; she cannot compel the tenant to pay again. It is similar to the case where a man seized in right of his wife, makes a lease reserving rent, and where his wife dies without issue by him, whereby he is not tenant by the courtesy, but his estate is discontinued, yet he is entitled to the rent until the heir has made an actual entry, because the lease was good at first, and drawn out of the seizure of the wife, and, therefore, until entry of the heir remains good, so that the lessor may distrain and avow for the rent till the heir has entered, Woodfall L. & T. 180. So the heir has the legal title to land until dower is assigned, and is, therefore, entitled to the rent. And it is only the heir or person having the freehold that can be called to account for that portion of the rents which he has recovered from the lands which are ultimately assigned for dower.

Thirdly. It is objected that there is a variance inasmuch as the rent for the last year being £5 and a ton of hay,

(1) 2 B. & C. 724; S. C. 4 D. & R. 276.

and the averment only alleges the money to be due without acknowledging satisfaction for the hay. But there is no material variance in this respect. The avowry states the demise reserving the yearly rent of £5 and a ton of hay correctly, but it then alleges £40 to be due for eight years' rent, and avows the taking for that, without acknowledging satisfaction for the hay. This is no variance, for it is supported by the evidence which shews that though the hay may or may not be due, the £40 is due. In Starkie Ev. 970, it is laid down, "that on *non tenuit* the defendant must prove the holding as alleged, and a variance as to the amount of the annual rent will be fatal, so as to the days when the rent becomes due. But a variance as to the *quantum* of rent due will not be material, providing the terms of the holding be proved as laid." No doubt an avowry for part of the rent due without shewing how the rent is discharged is bad, not because of the variance, but because it leaves the plaintiff liable to another distress for the residue, 1 Saund 201 N. 1, and this avowry may, perhaps, be defective in that respect. But the defect appears on the face of the plea, and, therefore, should have been taken advantage of by special demurrer, and if it could have been taken advantage of otherwise, justice would require that the defendant should be permitted to enter *remittur damna quoad* the hay, but I do not think that necessary.

Judgment for the avowant.

CALLAGHAN, APPELLANT V. HOBKIRK, RESPONDENT.

Appeal.—Right of Way.—Dedication to public, and to private persons.—Evidence.

In 1851 P. laid out a street, and in 1853 conveyed a building lot to defendant, and in 1854 laid off several new streets in the same block. Defendant removed a fence placed by plaintiff, a lessee of P.'s, across one of the new streets, and it was for doing so the action was brought. It was urged that the acts of P. amounted to a dedication to the public, and that, at all events, defendant had a *right of way*, as P.'s acts, as between him and his grantees, amounted to a dedication of a right of way to him.

Held, (Peters. J.) That there was no dedication to the public; also that, as defendant's deed was given before the street was laid off, there was no implied agreement between P. and defendant to grant him the right of way.

APPEAL heard 25th October, 1859.

Mr. E. Palmer for appellant.

The Attorney General for respondent.

3rd January, 1860.

PETERS, J. In this appeal the question turned on a right of way. It appeared that Peake, being owner of a piece of land, about 1851 laid out a street called Cross street, on which building lots were laid off, and in 1835 conveyed one of these lots to defendant. In 1854 Peake had a further survey made, when the whole block was laid off, several new streets being run and building lots laid off on them. And it is for moving a fence placed by the plaintiff (a lessee of Peake) across one of these streets laid off at such last survey in 1854 that the action is brought.

It was contended :

1st. That the acts of Peake amounted to a dedication of the streets so laid out to the public.

2nd. That, at all events, the defendant had a right of way in as much as Peake's acts (as between himself and his grantees) amounted to a dedication of a way to them.

As to the first point, I think the evidence clearly shews that there was no dedication to the public. In determining whether a way has been dedicated to the public or not the proprietor's intention must be considered, and if it appears that he did not so intend, no user, short of the period fixed by the Statute of Limitations, can give the public a right. It was clear here from the evidence, that up to within three or four years, Peake had maintained his fences across the intended street, but that they had been pulled down either by persons to whom lots had been sold or, as was stated by Moore, Peake's man of business, they were removed in consequence of its vicinity to a portion of the City called the "Bog," among the inhabitants of which, according to the witness, in cold weather a sort of fence-taking monomania prevailed, and that for three or four years the fences had remained down without being replaced. But the fact of the fences having been for some time maintained after the laying off the streets though afterwards allowed to remain down, so far from shewing an intention to dedicate, is strong evidence against the existence of such an intention. *Roberts v. Kerr* (1), and *Lethbridge v. Winter* (2), are strong cases on this point. In the former case it appeared in evidence "that some years ago a street was made over the *locus in quo* which had been before an inclosed field. That soon after the houses were finished a bar was placed across the street to prevent carriages passing through it, but that the bar was soon knocked down, since which time it had been used as a thoroughfare. On the part of the defendant it was contended that this amounted to a dedication to the public, at least as a footpath." But Heath, J., observed that the putting up of the bar rebutted the presumption of a dedication to the public. Such a dedication must be made openly and with a deliberate purpose. Nor could there be a partial dedi-

(1) 1 Camp. 262.

(2) Note to *Rex v. Lloyd*, 1 Camp. 260 at p. 263.

cation to the public, although there might be a grant of a footway only. This street, he thought, was to be considered merely a way for the use of the tenants inhabiting the houses on each side of it. In the latter case, "to a plea that there was a public footway over the *locus in quo*, and because a gate was wrongfully erected, the defendant pulled it down. It appeared, in evidence, that the gate in question had been recently put up in a place where a similar gate had formerly stood, but where, for the last twelve years, there had been none. It was, therefore, contended for the defendant that from suffering the gate to be down so long and permitting the public to use the way without obstruction for so many years, the plaintiff, and those under whom he claimed, must be considered as having completely dedicated the way to the public, and the gate could not be replaced. The plaintiff, however, under the direction of Marshall Sergeant, had a verdict which the Court of King's Bench, the following term, refused a rule nisi to set aside.

As to the second point, as the defendant's deed was granted before the *locus in quo* was laid off as a street, the supposed existence of such a street could have formed no inducement for his taking the land, and, therefore, no implied agreement as between Peake and his grantee to grant him a way through that street can arise. I forbear to express any opinion as to what the decision might have been had the defendant's deed been dated after the land was laid off in 1854, and a plan of the survey exhibited to the buyer, because the facts of the case have not rendered a consideration of it, in that view, necessary.

Judgment affirmed.

LISLE ANNE COMPTON V. JAMES C. POPE.

*Redemption of land sold for land-tax.—Owner and purchaser.
Compensation for improvements.*

The owner of land sold for land-tax applied to have the amount of redemption money ascertained, and to compel purchaser on re-payment thereof to re-convey. The purchaser was owner of the dower, and had been in possession, at time of sale, under an agreement to purchase. He submitted an account for £19 3s. 2d., made up of £5 13s. 2d. for purchase money; £3 10s. for ploughing and fencing, and £11 for erecting a house. The Act gives the owner a right to redeem within two years on re-payment of the purchase money with interest and all reasonable expenses, and a fair allowance for improvements. The question arose here as to whether the items for ploughing, fencing, and building a house, were such as a purchaser had a right to make, or for which, if made, he was entitled to compensation.

Held, (Peters, J.) That the purchaser, until the expiration of two years, is only an equitable mortgagee, and as such is allowed for *necessary* expenditure in keeping the place in repair, but not for other improvements, such as new buildings, except under special circumstances.

2. That there being no necessity shewn for the improvements defendant ought not to be allowed for them.
3. That as owner of the dower defendant was himself bound to pay one-third of the purchase money.
4. That on payment of the balance of the purchase money, etc., the defendant must execute a re-conveyance to plaintiff.

APPLICATION of owner of land sold for land-tax to have the amount of redemption money ascertained, and on payment thereof to compel purchaser to re-convey.

Mr. T. Stewart for plaintiff.

Mr. Edward Palmer for defendant.

1st January, 1861.

PETERS, J. This was an application under the Land Assessment Act, 11 Vic. c. 7 s. 12, by the owner of lands sold under the Act for non-payment of tax, to have the amount of redemption money ascertained, and to compel the purchaser thereof, on payment, to re-convey

the premises. The defendant, in his affidavit, in answer to the rule, sets out an account of the amount to which he contends he is entitled, amounting to £19 13s. 2d. This amount is composed of different classes of items, on which distinct questions arise. The first class, amounting to £5 3s. 2d , is composed of the purchase money, expenses and interest, to the whole of which the defendant is clearly entitled unless the special circumstances disclosed in the affidavits, to which I shall presently allude, are such as to render it unjust that he should recover them. The second class of items, amounting to £3 10s., consists of £2 for ploughing, and £1 10s. for cutting fence poles.

The third class of items, amounting to £11, consists of expenditure alleged to have been made in erecting a house on the premises.

With respect to these two last classes of items, the question arises whether they are of a description which the defendant had a right to make, or for which, if made, he is entitled to compensation from the owner who wishes to redeem.

The twelfth section of the act gives the owner of land sold for non-payment of tax a right to redeem within two years on repaying the purchase money with interest, and also all reasonable expenses attending the same, and a fair allowance for such improvements as shall be made thereon. The legal effect of this is, that the purchaser takes not a perfect title, but becomes merely a statutable mortgagee of the premises until the expiration of the two years, when (unless fraud or unfair dealing on the part of the purchaser can be shewn) the equity of redemption becomes foreclosed by the operation of the statute. If this be the legal effect of this clause, the situation of a purchaser of land so sold, so far as his right to allowance for improvement is concerned, is similar to that of any other mortgagee in possession, and the decisions on similar questions between mortgagor and mortgagee become precedents for determining a purchaser's right to

allowance for improvements made on land so purchased. Now the general rule of equity is that a mortgagee is allowed for necessary expenditure in keeping the estate in repair, yet he is not allowed for other improvements, such as new buildings, except under peculiar circumstances. In *Powell on Mortgages*, 188, it is laid down "that a mortgagee, before foreclosure, cannot exercise any act of ownership over the property which may incumber the mortgagor." And equity will restrain him from committing waste; thus, "where a mortgagee of an estate in fee had cut down trees, on application to the Court it was decreed that an account should be taken of what was cut down and the produce applied, in the first place, to the payment of the interest, and then to the sinking of the mortgage, and an injunction was granted to stay the felling of any more. But a distinction is made where the security is defective, for in that case the Court will not restrain the just creditor from his legal privileges, but then the timber cut down must be applied to ease the estate and not to the mortgagee's benefit. Nor can he open pits for gravel, peat, or coal, etc., nor change the courses of husbandry." (Note P.)

But although a mortgagee cannot do anything to incumber the estate mortgaged, yet he will be entitled to such expenses as he shall incur in necessary repairs, or other acts for the preservation of the estate mortgaged, and may add this to his principal debt, 1 *Pow.* 189. And in 2 *Powell*, 956, note 2, where the cases on this subject are considered, it appears that where allowance is claimed for improvements it must be shewn that they are necessary. Thus in *Marshall v. Cave* (1), there cited where the building being in a very dilapidated condition the mortgagee rebuilt the kitchen, pantry, etc., and double roofed the house which before was single roofed, he was allowed for the improvements, the vice chancellor saying,

(1) 3 L. J. Ch. 57.

“this mortgagee has not made new buildings for new purposes, he has only erected new buildings on the site of the old and for the same purpose as was served by them. The new buildings are merely substitutes for those which are too ruinous to be any longer useful.”

Chancellor Kent (1) thus sums up the doctrine, “A mortgagee in possession is likewise allowed for necessary expenditures in keeping the estate in repair, and in defending the title. But there has been considerable diversity of opinion on the question whether he was entitled to a charge for beneficial and permanent improvements. The clearing of uncultivated land, though an improvement, was not allowed in *Moore v. Cable* (2), on account of the increasing difficulties it would throw in the way of the ability of the debtor to redeem. But lasting improvements in building have been allowed in England under peculiar circumstances, and they have been sometimes allowed and sometimes disallowed in this country.” In *Russel v. Blake* (3), it is said that the mortgagee could not be allowed for making anything new, but only for keeping the premises in repair. All the cases agree that the mortgagee is to be allowed the expenses of necessary repairs, and beyond that the rule is not inflexible, but it is subject to the discretion of the Court, regulated by the justice and equity arising out of the circumstances of each particular case.

Now the building for which the allowance is claimed in the present case is entirely new. No necessity for its erection is shewn, though the building might be a convenience to a person working the land and enable the occupant to realize more from it, yet this was not necessary, as the land was surely a good security for the fifty shillings paid for it. And we think, therefore, that this is not an improvement for which the purchaser is entitled to remuneration from the owner. To give the

(1) 4 Com. 166.

(2) 1 Johns 385.

(3) 2 Pick. (Mass) 505.

word "improvements" the comprehensive construction contended for would open a wide door to injustice and oppression. A valuable farm or tract of land (as in the present case) may be bought in for fifty shillings. The purchaser, for the very purpose of rendering redemption difficult, or impossible, immediately sets to work to erect valuable buildings, or clear up a large tract of land. But the owner may not have wanted either land cleared or buildings erected on it, and, therefore, though a large amount may have been expended by the purchaser in making them, they may be of no value to the owner, or if they are his circumstances may be such as to render it impossible for him to redeem, and the consequence would be that he must lose his land in the one case, or pay for what is of no value in the other. We cannot suppose the Legislature intended the act should have so unjust and oppressive an operation. In construing acts regard must always be had to the law existing at the time of their enactment, of which the Legislature is presumed cognizant. And where a new act, by its operation, may create privities, or relations between individuals, without their consent, similar to those which at its passing were usually created with their consent, it is but reasonable to suppose it was intended that the statutory convention would confer similar rights, and that the rules of law which governed the rights of the parties under the voluntary contract should apply to the statutory contract also. And as the position of a purchaser of land, sold under this act, is clearly that of a mortgagee, we think the improvements contemplated by the act, and for which a purchaser is entitled to allowance on redemption, are, like those allowed to other mortgagees in possession, such as keeping buildings in repair, repairing fences, etc., and then only when it is shewn that they were necessary to be done.

With respect to the claims for ploughing and fencing, cases may, no doubt, arise where such a claim is admis-

sible. But a mortgagee cannot use the land in a materially different manner from that in which the mortgagor used it. Thus it has been decided that "he cannot change the course of husbandry." Now before a purchaser can charge for preparing land for a crop and fencing, he must, we think, shew that the land had before been cultivated. But the affidavits are silent on this point, and for aught that appears, the land prepared for crop may have been waste land which the owner never used and may have no intention of using for that purpose. Again, with respect to this claim, the account merely states £2 for ploughing and thirty shillings for cutting fence poles, and then the affidavit states that the defendant has laid out a considerable sum in improvements, etc., amounting to £19 13s. 2d., "the particulars of which are set forth in the account hereunto annexed." But we think this mode of allegation entirely too loose and uncertain. The defendant is to have a reasonable allowance for preparing the land, but before the Court can say what is a reasonable allowance it must be informed of the quantity of land prepared, and of what the preparation consisted. Forty shillings may be a very reasonable demand for manuring and preparing one acre, but it may also be a very unconscionable demand for preparing three or four in a different manner. Then again, with respect to the fencing, how much was cut is not shewn, nor whether it was placed on the land and remains there for the owner's use. Consistently with the allegation it may still remain in the woods where it was cut.

Another ground for disallowing the defendant's claim for improvements is, that it appears by his affidavit that at the time the tax for which the land was sold accrued due, he himself was in possession of the whole under an agreement for sale, and also of a life estate in a third part, under a conveyance from the plaintiff's mother of her dower. If such was the case it was his duty to have paid the tax. Under these circumstances, his allowing

the land to be sold and himself becoming the purchaser, we must attribute to his having discovered, perhaps shortly before the rule, that he had unintentionally omitted to pay the tax. Had he intended to use the title so acquired against the infant owner, we must presume that he would have given notice of his intention to do so, that she might resist the claim under the deed, or redeem it before it was incumbered by expense for improvements, which he does not appear to have done. Such being the double right, or character under which the defendant held possession, it is but reasonable to suppose that he made the improvements in his rightful character as owner of the dower or vendee in possession, rather than that of purchaser under the sheriff's deed, the clothing himself with which (under the circumstances) if intended to be used against the owner, would be an act of more than doubtful propriety.

As to the £5 3s. 2d. being the purchase money and expenses, there could be no question of the defendant's right to this, but here it appears that he was in possession of a third at least as owner of the dower. If the land had been purchased by a stranger, one-third of this amount would have had to be paid by him to save his life estate as tenant of the dower, and, therefore, as he himself has become the purchaser he can have no claim for it against the owners of the reversion. One third, therefore, of the £5 3s. 2d. must be deducted from his claim, which will leave £3 8s. 10d. to be paid to him by the plaintiff, upon payment of which she will be entitled to a re-conveyance.

The order will, therefore, be that upon the plaintiff, Lisle Ann Compton, paying to the defendant, James C. Pope, the sum of £3 8s. 10d., he do execute a reconveyance of the lands and premises called Wellings Point, situate on Township No. 17, mentioned in the affidavits read on the hearing of this cause, and stated in the

affidavit of the said James C. Pope to have been conveyed to him by sheriff's deed, dated the 26th day of October, 1858. And it is further ordered, that in such conveyance a proviso shall be inserted to the effect that such conveyance shall not in anywise prejudice, affect, or make void any right or claim which the said James C. Pope may have to the dower, or third of Maria Ann Compton in the said affidavits mentioned.

DOE DEM WIER V. SHAW.

Judgment as in case of non-suit—Plaintiff must show that his not proceeding to trial according to notice was not caused by his own negligence.

16th January, 1860.

RULE to shew cause why judgment, as in case of a non-suit, should not be entered.

Mr. E. Palmer shews cause.

Mr. Longworth, *contra*.

1st January, 1861.

PETERS, J. The plaintiff gave notice of trial for July Term, 1854, at Georgetown. The plaintiff in his affidavit states that the Chief Justice having been, while at the bar, concerned in the cause could not try it, and that he, supposing Mr. Justice Peters, who was then absent, would not return in time, countermanded the notice of trial, and he contended that for this reason the cause must be considered as if made a remanet, and, therefore, the defendant cannot have judgment as in case of a non-suit, but must proceed to trial by proviso. Without expressing any opinion as to whether the English rule that where a cause becomes a remanet this motion cannot be made, I am clearly of opinion that this cannot be considered to have been made a remanet in July, 1854, as the plaintiff himself countermanded his notice of trial, and, therefore, on the first day of the Term was not in a position to try it if it had been called on. It appears by the defendant's affidavit that notices of trial have been given in July, 1853; March, 1855; July, 1855; July, 1856; March, 1858; July, 1858, besides notices for July, 1854; March, 1857, and July, 1857, and yet the plaintiff has never proceeded to trial. The plaintiff in his affidavit states as an excuse for July, 1856, March, 1857, and July, 1857, that Lemuel Cambridge, a material witness for the plaintiff, was unable to attend, and that in July, 1858, and March, 1858, the cause could not be

brought to trial owing, partly, to want of access to a certain deed referred to by the said Lemuel Cambridge which could not be discovered, and partly owing to other reasons which cannot be disclosed without great prejudice to the plaintiff. Now the facts stated as an excuse for not proceeding to trial must be such as to satisfy the Court that the plaintiff's delay arose, not from a wish to delay the trial, or from negligence, but from necessity, or some other just and reasonable excuse. Now looking at the facts stated in these affidavits, I cannot say this appears to be the case. Since 1855 to 1860 a period of five years has elapsed, a time, one would suppose, sufficient to find a deed if it could be found. And as to Cambridge, if he was too ill to attend, his evidence might have been taken *de bene esse*. It is impossible not to see that great delay (whether from neglect or intention) has taken place, and I, therefore, think this rule should be made absolute.

Rule absolute.

HAROLD CRESWELL, APPELLANT, V. CHARLES S. HUNT,
RESPONDENT.

Sheriff's fees—Lands taken in execution but not sold—Poundage.

Plaintiff was deputy sheriff of Prince County, and had extended an execution at Hunt's suit on lands of a judgment debtor of the latter. The debt was settled and the land was not sold. The plaintiff then brought his action in the Commissioners Court against Hunt for his expenses and *poundage*, and that Court gave judgment for the expenses but refused to allow the poundage, and from that judgment the plaintiff appealed.

Held, (Peters, J.) That plaintiff was not entitled to poundage.

7th January, 1862.

PETERS, J. This was an appeal case. The plaintiff, deputy sheriff of Prince County, had an execution at the defendant's suit under which he levied on goods which produced on sale £27. But on the fees respecting them no question arises. The plaintiff also extended the execution on some land, the defendant settled the debt, the land was not sold, and the plaintiff brought his action in the Commissioners Court for his expenses and poundage. The Commissioners gave judgment for the expenses, viz., travelling and advertising, but refused to allow the poundage, and from this judgment the plaintiff appeals.

It is by the English practice well established that when on a *Fi. Fa.* the sheriff levies, and the parties compromise before he sells, he is, notwithstanding, entitled to poundage. But the English cases arose on the 29 Eliz. cap. 4, which provided that for executing any extent on the body, goods or lands, the sheriff shall have so much for every £100 he shall so levy, or extend and deliver in execution. The moment the levy on goods is made the sheriff's right to the poundage, by the express words of the statute, attaches.

Here the sheriff's right to poundage rests on the Island act, 16 Geo. 3, cap. 1, which provides that "for levying, paying and receiving all monies under execution," he is entitled to poundage. Now under this act it might be

doubtful whether the sheriff, in any case, would be entitled to poundage until he had not only levied, but paid over the money. But the practice has, with respect to goods levied on, been otherwise, and in such case as the sheriff must take possession of the goods and thereby incur trouble, risk and responsibility for which, except from the poundage, he would have no remuneration, the authority of *Alchin v. Wells* (1), might be held to apply.

But the right to take lands in execution for debt is given by 22 Geo. 3 c. 9, which provides "that when there is not sufficient personal estate whereon to levy, the sheriff shall extend the execution on the real estate of the debtor," and after taking certain steps, "shall sell so much of it as will discharge the execution with costs and charges." Nothing is said about poundage, only the costs and charges, which can only mean the fees for travelling, posting notices, and other incidental expenses.

Again, where the sheriff levies on goods, he has not only a right, but it is his duty to take them into his possession and to sell them, by which risk and trouble is incurred. But when he merely extends an execution on land he takes no possession; for by the fourth section it is provided "that the sheriff or his deputy shall on no account disturb any person or persons in possession of lands, or tenements, at the time he shall levy execution thereon, but shall leave each person or persons in the peaceable possession thereof until final sale shall be made as aforesaid." Neither does the levy give him any immediate right to sell. He must advertise it for two years, during which time the defendant remains in possession, and before the expiration of which he may pay the debt. The case is somewhat analogous to *Graham v. Grill* (2), where under a levy on a *capias utlagatum* where no *venditioni exponas* had been issued, a claim for poundage was made. Lord Ellenborough says, "but is

(1) 5 T. R. 470.

(2) 2 M. & S. 294.

there not this difficulty here that there has been no levy of the money, and, therefore, supposing that a *capias utlagatum* to come within the words, 'extent or execution,' in the statute of Elizabeth, must not the money be levied in order to entitle the sheriff? The right of the sheriff to poundage is a right merely *positivi juris*, and, unless especially conferred by Act of Parliament, he cannot claim it. The *capias utlagatum*, in its original form, is for the punishment of the party's contumacy, and not for payment of the debt." So here the extending execution on the land does not empower the sheriff to sell it, or in any way meddle with the land, but merely to take certain preparatory steps which will authorize a sale at a future period. Substantially the whole proceedings of the sheriff seem to amount to nothing more than a notice by a mortgagee under a power of sale that the land will be sold on a certain day unless the debt and expenses be sooner paid.

Looking at the whole of the 26 Geo. 3, c.9, I am of opinion that under its provisions the sheriff is not entitled to poundage even where he sells, and that before he can claim under 16 Geo. 3, cap. 1, he must receive and pay over, or (at least by the arrival of the period of sale) be in a position to do so, which was not the case here.

The consequence of holding the mere extending the execution on land to vest a right to poundage would be most serious against debtors, and such as, I think, the Legislature never contemplated. An execution for £5,000, money lent and secured on land on a judgment (a very common occurrence) might issue, and the debtor a month after may raise the money to pay off the security. All that the sheriff had done would have been to travel a few miles and post some advertisements, for which specific services he is paid, yet if his right to poundage attaches on the levy the debtor would have to pay many pounds to the sheriff besides the debt, costs and expenses.

The appeal must be dismissed with costs.

WILLIAM C. BLACK v. WILLIAM SHAW, AN AB. DE.

Absent Debtor Act—Service of summons on garnishee—Irregularity.

Vaux issued a summons under the Absent Debtor Act, 20 Geo. III. chap. 9, sec. 2, which enacts that such summons “being duly served, and return being made thereof, under the hand of the sheriff, or his deputy, shall be sufficient in law to bring forward a trial without any other or further summons.” It was against McNutt, as trustee or garnishee of defendant, and was served by the clerk of Vaux’s attorney, and there was no return thereof under the sheriff’s hand. A similar summons was afterwards served on McNutt by Black, by whom motion was now made to quash the former summons on the ground that it could only be legally served by the sheriff. In reply it was contended: 1st, that the clause in the Act was merely directory, and that the service by the clerk was good. 2nd, that supposing it bad, the objection could only be taken by the defendant, Shaw, and not by another attaching creditor, who is no party to the proceedings, objected to.

Held. (Peters. J.) That a mere irregularity in the service might be waived by defendant, but the absence of the sheriff’s return was a defect which rendered the subsequent proceedings void, and could not be cured by any act or consent of the opposite party.

2. That the attaching creditor’s judgment giving him a lien on funds in the garnishee’s hands placed him in the defendant’s shoes *quoad* those funds, and being, therefore, a privy in interest he had a right to point out defects in proceedings affecting them.

MOTION to set aside summons against trustee of absent debtor.

1st November, 1861.

Mr. Haviland shews cause.

Mr. Brecken follows.

Mr. Hensley, *contra*.

7th January, 1862.

PETERS, J. In this case an attachment at the suit of Vaux having been issued against the defendant, an absent debtor, no goods being found to attach, a summons was issued against McNutt as trustee or garnishee, which was

served by the clerk of the plaintiff's attorney. A summons was subsequently served on McNutt by the plaintiff, Black, also an attaching creditor, by whom motion is now made to quash the former summons, on the ground that it could only be legally served by the sheriff.

It was contended in reply: 1st, That the clause in the Act 20, Geo. 3, cap. 9, is only directory, and that the service by the clerk is good.

Secondly. That supposing it bad, the objection can only be taken by the defendant, Shaw, and not by another attaching creditor who is no party to the proceedings objected to.

The second section of the act provides that where there are no goods to attach the plaintiff may "file a declaration against such absent or absconding person, and also cause the trustee of such absent person to be served with a summons out of the clerk's office, being annexed to the declaration fourteen days previous to the sitting of the Court, which, being duly served, and return being duly made thereof, under the hand of the sheriff or his deputy, shall be sufficient in law to bring forward a trial without any other or further summons."

The act, in very clear language, requires two things to be done to bring forward a trial. First, service of summons and declaration; and secondly, due return of service under the hand of the sheriff. The last requisite is here wholly wanting, and we are, therefore, clearly of opinion that there is nothing on which the proceedings of Vaux against the trustee, McNutt, can be maintained.

The other point, that the objection cannot be taken by another attaching creditor, raises a question of considerable importance on the practice under this act. On this point much reliance was placed by counsel in opposing the motion on American authorities.

In Drake, on Attachments (1), it is laid down that "whatever irregularities may exist in the proceedings of

an attaching creditor, it is a well settled rule that other attaching creditors cannot make themselves parties to these proceedings for the purpose of defeating them on that account." *Camberford v. Hall* (1), decided in South Carolina, (where, under a statute which declared that every attachment issued without bond is void, it was held that the garnishee could not take advantage of the insufficiency of the bond) was cited from a written copy of the report. But on turning to Drake, 715, where this case is cited at length, I find other decisions under the same circumstances to the contrary. Thus in *Ford v. Woodward* (2), decided in Mississippi, under a statute which declared that every attachment issued without bond and affidavit taken and returned is illegal and void, and shall be dismissed; it was held on a writ of error, sued out by the garnishee, that a judgment against the garnishee, where such bond and affidavit had not been taken and returned, was erroneous because the proceedings against the defendant were illegal and void. In Louisiana, Missouri, and Alabama, the decisions seem to concur with *Camberford v. Hall*. But in a subsequent case, *Bank of Mobile v. Andrews* an attachment for want of an affidavit and bond was quashed at the instance of the garnishee. From this review of the American decisions there appears as many authorities in favor of the application as against it.

Creighton v. Daniels (3), decided in Nova Scotia, where it was held that a defect in the return day of the writ could not be set aside except at the instance of the defendant, appears from the language of Judge Bliss to have turned on the particular words of the colonial statute, which differ from ours. He says, "two cases are specified by the statute in which a subsequent attacher, or other person interested, may apply to set aside the proceedings, and they are the two strongest cases which

(1) 3 McCord, 345.

(2) 2 Smedes & Marshall 260.

(3) James 347.

can be imagined, and in which, if in any case, no enactment would be required. We may, therefore, reasonably infer that the statute did not intend that any other objection should be taken."

I quite concur in the general position laid down by Drake, that irregularities can only be taken advantage of by parties to the suit. The same doctrine is laid down by Archibold and other English books of practice. In general it is only the opposite party, or his representatives, or those claiming under him, that can take advantage of the irregularity, and strangers to the proceedings cannot do so. The reason for this rule is, first, that a mere stranger, having no interest, would not be heard in any case. But even a stranger who has an interest cannot do so, because the defendant may waive the irregularity, and, therefore, a stranger cannot interfere to complain of that to which the defendant may elect to submit, and by doing so cure the defect. But there is a great difference where the proceeding is that pointed out by the practice of the Court, and the error is merely in the manner of taking it, and where the proceeding is altogether wanting, or different from that which is required. In the first case it is merely an irregularity which the opposite party may waive. In the other it is a nullity which no act or consent of the opposite party can cure. Now the objection here is that the sheriff's return of the service of the summons and declaration, which is a matter of record on which the subsequent proceedings are founded, is wholly wanting. This, therefore, is an error which the defendant himself could not waive, and without it all the subsequent proceedings are void.

It was argued that the garnishee did not object to the informal notice, but he could no more waive the error so as to cure the nullity than the defendant could.

With respect to the garnishee's right to object to irregularities, Drake, 741, says, "the decision of this

point depends mainly on whether the defect or irregularity be such as would prevent the garnishee from pleading the judgment against him in bar of a subsequent action by the defendant for the debt in respect of which the garnishee was held liable. There could be no propriety in rendering a judgment against a garnishee which would not protect him from a second payment of his debt to the defendant, while there could be still less in permitting him to defeat the plaintiff's action by assuming a ground which the defendant either did not consider available to himself or chose to waive."

Now, in this case a judgment against the garnishee must shew the sheriff's return, and a plea founded on a judgment which did not would be bad, and so, according to the principles laid down by the American commentators, this motion, if made by the garnishee, might be maintained. There seems the strongest reason for the Court's interference at the instance of a subsequent attaching creditor, who, as in this case, has obtained judgment in the attachment suit. Such judgment gives him a lien upon the funds in the hands of the Court or garnishee for distribution. The principle drawn by Nesbit, J., in *Smith v. Gettinger* (1), cited in Drake (2), after a review of the American decisions, as established, is that the attachment, and also the judgment, may be vacated at the instance of other creditors for fraud, or for anything that amounts to fraud upon the rights of other creditors. And at page 780, "according to the course of decisions in some of the New England States, there are other cases in which attachments will be held to be dissolved as to subsequent attaching creditors by the action of the plaintiff. Each attacher has a right to the surplus of the defendant's property after satisfying the previous attachments, and any act of an attaching creditor which increases the demand upon which he attached as it is, in effect, a fraud upon the subsequent attachers, as in those

(1) 3 Georgia R. 140.

(2) 275.

States regarded as dissolving his attachment as to them. Thus the filing a new count to the declaration which does not appear by the record to be for the same cause of action as that originally sued on will produce this result."

Now whether the funds for distribution are sought to be claimed through any collusion with the defendant, or under the pretence of a judgment or proceeding which the Court sees is void, and which, therefore, confers no right on the party claiming to participate in the distribution of the funds, makes, I think, no difference, the one being as invalid and injurious as the other on the rights of other creditors whose proceedings are valid; and if the mere addition of a new count to the declaration is held in effect to be a fraud on subsequent attachers, it is difficult to perceive why an attempt to claim the fund under a void proceeding should not be equally so. The true rule in these cases appears to me to be that where mere irregularity exists which may be waived by the defendant, other attachers cannot move to quash the proceedings. But where the error renders the proceedings a nullity and void, and cannot, therefore, be waived by the defendant, there a subsequent attacher, who has obtained judgment, may move to quash the proceedings.

Another ground on which we think this motion may be maintained is that the judgment against the defendant in the principal suit gives the attacher a lien on the funds in the garnishee's hands, and, therefore, *quoad* the amount of his claim, places him in the defendant's shoes with respect to those funds. He is, therefore, a privy in interest, and as such authorized to point out defects in proceedings which affect those funds.

This rule must be absolute.

WOOD v. GAY.

Absent Debtor Act, 20 Geo. 3, cap. 9—Suit begun by attachment must be brought to trial at third term—Discontinuance.

An attachment under 20 Geo. 3, cap. 9, and all subsequent proceedings, are dissolved if the plaintiff neglect to bring the cause to trial at the third term without having obtained leave to continue it to another. A motion to set aside such proceedings may be made by a subsequent attacher who tried and obtained judgment at the third term.

MOTION to set aside absent debtor attachment and other proceedings in case of Haszard vs. same defendant.

1st November, 1861.

Mr. C. Palmer shews cause.

Mr. Longworth, *contra*.

7th January. 1862.

PETERS, J. In this case the question is, first, whether an attachment under 20 Geo. 3, cap. 9, and all subsequent proceedings are not dissolved by the plaintiff neglecting to bring the cause to trial at the third term without having obtained leave to continue it to another. And secondly, whether a motion to set aside such proceedings can be made by a subsequent attacher who tried his cause and obtained judgment at the third term.

The statute, after providing that the agent may be admitted to defend, provides "that at the third term, without special matter alleged and allowed in bar, abatement or further continuance, the cause shall peremptorily come to trial." This language, that the cause shall peremptorily come to trial at the third time, unless in consequence of special matter alleged a continuance be allowed, seems to shew an intention that without such special matter alleged and allowed no continuance shall be granted. Before the Statute of Jeofails any lapse or want of continuance was a discontinuance of the suit, put the parties out of Court and compelled the plaintiff to begin *de novo*, Tidd's Pra. 733. A mere continuance by imparlance *vicecomes non misit breve* or *curia advisare*



vult is, however, laid down to be a mere matter of form, and may be entered at any time, and it is said may be made by the attorneys in their chambers, Tidd's Pra. 161, and the want of such a formal continuance is cured after verdict or judgment by the Statute of Jeofails. But is the continuance mentioned in this act a mere form such as those the Statute of Jeofails was intended to cure? It seems something of a very different nature. It cannot be made by the attorney at his chambers, nor in the Court unless with express leave of the Court granted on express application. How could Haszard make up his judgment without the record shewing a continuance at the third term, and how can the officer insert this in the roll when none was granted?

In *Rex v. Ponsonby* (1), in making up the roll the entry of a continuance by *curia advisare vult*, and day given by Court in Easter Term following, skipped over two terms, viz., Michaelmas and Hilary, and entered judgment of Easter. This was held a discontinuance until amended, and as there was nothing in the court of error to amend by, the Court could not insert it. Dennison, J., says this discontinuance is fatal on demurrer, and there is no Statute of Jeofails that will help it. For aught we know there may be a record in Ireland that will make it complete, and, therefore, we can grant a continuance to inform the conscience of the Court before we give judgment, but after a record is sent hither this Court cannot amend it without something to amend by. Now suppose Haszard moved for leave to amend his erroneous judgment, what would there be for the Court to amend by? Where it was a mere form the Court could (if it were necessary) grant leave to amend the roll by entering a continuance. But how could the Court entertain a motion on the ground required by the Statute of special matter alleged at the third term, when its records shew

(1) 1 Wils. 303, in error.

that no such special matter was alleged, and no motion to continue the cause made? The practice has always been where a plaintiff was not ready to try at the third term to move for leave to continue.

The statute gives extraordinary power by authorizing a plaintiff to deprive the defendant of control of his property before the legality of his claim has been established by judgment, and also postpones the claims of subsequent attachers until the first is disposed of. The tardy prosecution of his suit by a prior attacher may be injurious, not only to the defendant, but may delay others in obtaining satisfaction of their judgments. The policy of the framers of such an act must be to enforce speedy and effectual prosecution of his suit by a party seeking to avail himself of its extraordinary power. In similar acts in the United States this is sought to be obtained by requiring a bond with security from the plaintiff for the prompt and effectual prosecution of his suit before the attachment issues. No such security is provided by our act, but the Legislature seems to have intended to provide one by compelling the plaintiff to have the validity of his claim determined at the third term unless he shows special circumstances to induce the Court to grant him further time for doing so. And, we think, that in this case Haszard having failed to do either, his suit is discontinued and his attachment dissolved.

As to the second point, on the principle we have just laid down in the previous case of *Black v. Shaw* (1), as the defect here renders the whole proceedings void it is clear the subsequent attacher, Wood, may make the application.

The rule will, therefore, be that the attachment and all subsequent proceedings at the suit of Haszard against the defendant, so far as the same relate to or in anywise affect the attachment and proceedings of the plaintiff, Wood, be set aside.

(1) Ante p. 194.

McKEAN & SUTHERLAND V. MCKENZIE, AN AB. DR.

Absent Debtor Act. 20 Geo. 3. cap. 9—Both parties resident abroad—Attachment will lie against defendant temporarily within jurisdiction but concealing himself.

Both plaintiffs and defendant were residents of Nova Scotia, where also the debt was contracted. Defendant came to P. E. I. temporarily, and while here plaintiffs caused a bailable writ to issue against him, but he concealed himself to evade arrest, and it was returned *non est inventus*. Plaintiffs then issued an absent debtor attachment, and summoned Yates as garnishee, he having property of defendant's in his possession. A motion was now made by defendant to quash this attachment, on the ground that both parties being non-residents, and the debt contracted abroad, they did not come within the provisions of the act. Two questions were raised, 1st, whether a non-resident could proceed by attachment for a debt not contracted here; 2nd, whether a non-resident defendant, here for a temporary purpose, was, under the circumstances, liable to be proceeded against.

Held. (Peters, J.) That the non-resident plaintiff could proceed, and that the non-resident defendant was liable.

MOTION to quash an Absent Debtor Attachment.

4th July, 1861.

Mr. Charles Palmer shews cause.

Mr. Edward Palmer, *contra*.

7th January, 1862.

PETERS, J. In this case a motion is made by the defendant to quash an attachment issued against his property under the Absent Debtor Act. From the affidavits it appears that both the plaintiffs and defendant are residents of Nova Scotia, and that the note of hand on which the action is brought was given in that Province. It also appears that the defendant owned a schooner, and was in the habit of trading to this Island, and in November last, while here with his vessel, a bailable writ was issued against him at the instance of James N. Harris, the plaintiffs' agent in this Island, to recover the amount of the note. It is sworn by McQuaid, a person in the employ of Harris, who was sent with the sheriff to point

out the defendant, that he could not then be found, and that he again accompanied Collins, an officer, for a similar purpose, and that deponent believes that the defendant concealed himself many days to avoid arrest; and there appears little doubt, from the affidavit of this deponent, and also from an affidavit of the plaintiffs' attorney, that the defendant, when applied to for the payment of the note, led Harris to believe that he would pay it out of the proceeds of his vessel, but that having sold her to Yates (who is also summoned as garnishee) he secreted himself to evade arrest. The sheriff having returned the writ *non est inventus*, on the twenty-fifth of March the plaintiffs issued an attachment and summoned Yates as garnishee. There is no affidavit of the defendant denying concealment to evade arrest. The motion is made on the ground that both plaintiffs and defendant being non-residents, and the debt contracted abroad, they are not within the provisions of the Absent Debtor Act. Two questions are thus raised which require to be separately considered.

1st. Whether a person, not a resident of the Island, can proceed by attachment for a debt not contracted here. 2nd. Whether the defendant, also a non-resident, but here for a temporary purpose, is, under the circumstances of this case, liable to be proceeded against.

Numerous decisions on this, and various other points, may be found in the United States Reports. But although each State has an Absent Debtor Act, scarcely any two of them are exactly similar; while in most, specific provisions for particular cases leave less room for the application of general principles in their construction than is necessary in the more brief and general enactments of our Statute. Thus in Virginia, attachment is held to lie where both plaintiff and defendant reside out of the Commonwealth. In Ohio it lies for any creditor whether he be a resident or not, 2 Kent 203. Reliance

on such decisions would be more apt to lead to error than to assist, and, I think, on such points, at least, the safer course is to apply the ordinary rules of construction to our own Statute, and by that means endeavor to ascertain its intention.

The act provides that any person entitled to any action (meaning, of course, a right to maintain an action in the Courts of this Island) for any debt, or demand, against any absent or absconding person, may cause his goods and estate to be attached. Now the payee of a note made abroad is as much entitled to maintain an action against the maker, if he happens to find him here, as if the note were made to a resident payee, and, therefore, if the conduct of the debtor has been such that a resident creditor could attach, it appears to me clear that a non-resident, even if he has never been in the Island, may do so also. In such cases the residence, or non-residence of the plaintiffs, as well as the locality of the debt, are, it seems to me, wholly immaterial. The only question being, could the plaintiffs maintain an action against the defendant in this court if he found him here? And if he could, has the defendant's conduct brought him within the provisions of the act? To hold non-residents in such a case to be under a disability, which did not attach to residents, would be open to this monstrous consequence, that if goods were supplied in Nova Scotia and the debtor brought them here and then conducted himself so as to become liable to attachment, the goods of the non-resident creditor might be attached by residents here, while the Nova Scotian creditor would be debarred from having recourse against them for his demand.

Whether attachment will lie by an inhabitant on a debt contracted here against a debtor who has never been in this Island, is a question not now necessary to be considered. It is clear that in such a case a non-resident plaintiff could not attach for a debt contracted abroad, because the defendant never having been within the

jurisdiction, there never was a time when the ordinary process of our Court could be served on him, and, therefore, there never was a time when such a plaintiff could (without the aid of this statute) commence an action against him in this Court, and whatever the intention of the Legislature for the protection of its own citizens on contracts with foreigners, might be, to hold that it intended to give our Courts power over parties and contracts never within the limits of its jurisdiction, would be to ascribe an intention to exceed its authority. This was the case in *Kenny v. Liddle and Low*, decided by the late Chief Justice Jarvis (1).

The plaintiffs in this case being entitled to proceed under the Act, the next question is, was the defendant an absent or absconding debtor within the intention of the Act?

The Act mentions two cases. 1st, That of absent debtors. 2nd, absconding debtors. The clause in the second section directing service of the declaration at the last place of abode, of inhabitants, or "persons" who have for some time had their residence in the Island, shews that it contemplates the case of non-residents as well as of resident inhabitants absenting themselves. But whether it intended to include persons who have never been here, as well as persons here only for a temporary purpose, is not so clear, nor is it now necessary to decide. Neither is it necessary to decide whether a person here only for a temporary purpose, and merely absenting himself by departure from the Island without intention of delaying his creditors, can, after his departure, be proceeded against under the Act, on a contract made abroad by a creditor, also a non-resident, who took no steps against him while here. The question in this case is whether the defendant did not, by his conduct while here, bring himself within the Act as an absconding debtor.

(1) Not reported.

Drake, p. 72, defines an absconding debtor to be one "who with intent to defeat or delay the demands of his creditors conceals himself or withdraws himself from his usual place of residence, beyond the reach of process." Departure from the country is necessary to constitute a man an absent debtor. But departure, though frequently an incident, is not necessary to render absconding complete. This is clearly admitted by all the judges of Nova Scotia in *Staples v. Taylor* (1). Drake, in treating of what constitutes abscondency, comes very near the particular case we are considering; he says, p. 73, "since concealment or withdrawal from one's abode with intent, before mentioned, seems to be a necessary element of absconding, it cannot be said of one who resides abroad and comes thence into a particular jurisdiction, and returns from that jurisdiction to his domicile, that in leaving the place which he had so visited, he was an absconding debtor. And under a statute authorizing an attachment against any person absconding or concealing himself so that the ordinary process of law could not be served upon him, it was held that only residents of the State who absconded were within the scope of the law, and that an attachment would not lie for that cause against one who had not yet acquired a residence there."

In Alabama, however, it has been held that upon affidavit that the defendant "absconds or secretes himself so that the ordinary process of law cannot be served upon him, an attachment will lie though the defendant is a resident of another State, and was only casually in the State of Alabama."

Here again, on statutes precisely similar, are the decisions directly contrary to each other, so that little assistance can be derived from them in determining the point.

The Act clearly contemplates non-residents, in some cases, coming within its scope. Now, (whatever doubt

(1) James, 320.

may exist, whether a person coming here merely for a temporary purpose and returning home without notice of any proceedings against him comes within the Act) it appears to me clear that if such a person, while here, commits an act of abscondency by secreting himself to avoid arrest, he comes within the express words of the Act as an absconding debtor. And we think that as the plaintiffs in this case had a right to bring their action against the defendant while here, and commenced it by issuing a *capias* against him which he evaded by concealing himself, he committed such an act of abscondency as is contemplated by the Act, and, therefore, the plaintiffs' attachment must be sustained.

Rule discharged.

LAWRENCE SULLIVAN V. ARCHIBALD RAMSAY.

Land Tax Act, 11 Vic., cap. 7, sec. 12—Power of Supreme Court—Equity of redemption—Application to redeem—Charges disallowed.

Application to redeem land sold for non-payment of land-tax.

The statute gives an equity of redemption for two years from sale on payment of the purchase money with lawful interest and reasonable expenses, and a fair allowance for improvements. In this case the plaintiff tendered £6, but defendant claimed £11 6s. 8d., in which he included charges for clearing land, attending the sale, attending to register deed, attending to pay land-tax, having land surveyed, etc. The defendant contended that the Supreme Court had no jurisdiction, and that plaintiff must resort to the Court of Chancery.

Held, (Peters, J.) That the Court had jurisdiction, and that during the two years the purchaser could neither commit waste nor claim remuneration for improvements which a mortgagor in possession could not claim, and, therefore, the charge for clearing land could not be allowed. Also, that in the absence of positive allegations in defendant's affidavit supporting the charges for surveying and attending to register they could not be allowed, and that the charges for attending the sale and to pay land-tax could not be allowed in any case.

APPLICATION to redeem land sold for non-payment of land-tax.

29th January, 1862.

Mr. Johnstone shews cause.

Mr. E. Palmer follows.

The Attorney General, *contra*.

6th May, 1862.

PETERS, J. This is an application to redeem land sold for non-payment of tax under 11 Vic. cap. 7, sec. 12. From the affidavits it appears that the defendant claims £11 6s. 8d., and that the plaintiff tendered £6.

It is objected, first, that this Court has no jurisdiction and that the plaintiff must resort to Chancery for relief. The twelfth section of the Act provides—That where lands

are so sold an "equity of redemption" shall be open to the former owner or proprietor for two years from the day of sale, such owner or proprietor repaying the purchase money with lawful interest thereon, and also all reasonable expenses attending the same, and a fair allowance for such improvements as shall be made thereon, "the same, in case of a dispute, to be ascertained by the Supreme Court."

Mr. Palmer presented this point in a very brief, but lucid manner, when he observed that this clause must give the Court very extensive or very limited powers. He contended that its power was of the latter kind, very limited. That it had no original jurisdiction. That the application must first be made in Chancery, when, if the amount of the claim is disputed, an issue may be directed to this Court to ascertain the amount.

Now if this Court had no original jurisdiction what proceedings must be gone through with before a case could be decided? A suit must be brought in chancery. Then if there is a dispute about the value of improvements or expenses, an issue must be sent to this Court. Here a trial must take place. The result must be certified back to the Court of Chancery before it can be in a position to decide. All this tedious and expensive machinery must be put in motion to decide a matter of £5 or £10.

The policy of our Legislature has been to provide for determining controversies, involving small amounts, in a summary manner, and, therefore, if the intention were more doubtful than it is here, we should pause before giving a clause so general in its terms an operation contrary to the ordinary spirit of the Legislature on such subjects.

Besides, if the Act contemplated an application to Chancery in the first instance, why is the Supreme Court mentioned? Its only office, according to the argument,

is to decide the *quantum* of value, or expenses on an issue. But the Court of Chancery, in the exercise of its ordinary jurisdiction, can always direct an issue to be tried in a court of law for its assistance. Therefore, unless the words "the same in case of dispute to be ascertained by the Supreme Court," were intended to give this Court original jurisdiction, we must hold them to be mere surplusage. But in construing statutes the Court are (if possible) to avoid rendering any word or sentence superfluous or insignificant. Whether in a case where, through some fraud or contrivance of a purchaser, an owner is induced to let the period for redeeming go by without a tender or offer to redeem, this Court would have jurisdiction, may be a question. In such case the plaintiff's right of action or suit would rest on fraud rather than on the Act, and a resort to Equity might then be necessary, but we express no opinion on this point.

Another question is raised on a charge for improvements. The land appears in a wilderness state. The purchaser, in his affidavit, states that he made improvements to the value of forty shillings in cutting away spruce bush on the land. This same question was decided in the case of *Compton v. Pope* (1), and as, after fully considering the arguments and authorities offered at the bar, we see no reason to doubt the correctness of that decision, it is unnecessary to enter now at length into reasons which were then stated. The construction contended for would permit the perpetration of great wrong. Now, though where the meaning is plain, consequences are not to be regarded in the construction of statutes, yet it is laid down by Bacon, Title, stat. 9, that where the meaning is doubtful the consequences are to be considered in the construction. The reason for this rule is obvious. The Court are bound to follow the intention of the Legislature. Where the language of an act is capable of but one meaning there is no difficulty in ascertaining it, but to do so where general words are

(1) Ante p. 181.

used it is necessary to consider whether a particular construction may lead to absurd, unjust, or inconvenient consequences, otherwise a mischievous operation might be given to an act which the Legislature never intended it to have. To give the word "improvements" the comprehensive meaning contended for would enable the purchaser to treat the land as if he had an indefeasible estate therein. He might cut timber to any amount, might clear land which the owner might not wish cleared, erect buildings, and claim payment for doing so. Indeed it is difficult to foresee the mischievous consequences which might flow from adopting the construction contended for. Under it a person, acquiring such temporary possession, might cut down ornamental groves or trees, and thereby cause great loss or injury to the owner; he might, in short, commit waste to almost any extent, or erect buildings, or make other alterations in the state of the property, and claim compensation for them. No Legislature could have intended the Act to have such an operation.

The form of the deed is given in the schedule to the Act, and the proviso giving the "equity of redemption" must be considered as if inserted in every deed, and it, thereby, places the purchaser in the situation of a mortgagee in possession. This construction, while it confines the purchaser's use of the property within those well defined rules, which prevent unnecessary injury to the owner, fully answers the object of the Legislature by enforcing payment of the small tax the owner omitted to pay.

We think a purchaser, during the period allowed for redemption, can neither commit waste nor claim remuneration for improvements which a mortgagee in possession could not claim, and, therefore, this claim of forty shillings for cutting trees must be disallowed.

In addition to this the purchaser, Ramsay, attaches in his affidavit the following account:

Purchase money 41s., attending sale, 10s.,	£2 11 0
Deed 10s., registry certificate 2s. 6d.,	0 12 6
Registry deed 10s., tax for two years 13s. 5d.,	1 3 5
Travelling to pay tax twice, 20s.,	1 0 0
do to town to register deed, 40s.,	2 0 0
Surveyor one day, 12s. 4d., three men with surveyor one day each, 15s.,	1 7 4
Interest to date, 12s.,	0 12 0
	<hr/>
	£9 6 3

The affidavit merely states that he furnished the owner's agent with this account. It contains no allegation that he did travel to Charlottetown for the particular purpose of registering the deed, or that when he did come here with it (if he did) he did not come on other business. Neither does it contain any allegation that he employed or paid a surveyor. If positive and distinct allegations to this effect had been made, those charges might have been admissible, but from the extremely vague and uncertain manner in which the affidavit in this respect is framed, no regard can be paid by the Court to any items in that account, except those which we see must, necessarily, have been paid or incurred. These are as follows :

Purchase 41s., deed 10s.,	£2 11 0
Registrar's certificate,	0 2 6
Registering deed.	0 10 0
Tax for two years,	0 13 5
Interest,	0 4 0
Tax sworn to be paid since service of the Rule,	0 5 0
	<hr/>
	£4 5 11

The charges for attending the sale and to pay the land-tax we think wholly inadmissible.

As the plaintiff in this case tendered to the defendant a larger amount than he was entitled to, which he refused to accept, he is entitled to the costs of this application.

The order will, therefore, be,

That the said Lawrence Sullivan do pay to the said Archibald Ramsay the sum of £4 5s. 11d., within six weeks from the date of this order, and that, thereupon,

the said Archibald Ramsay do reconvey and surrender the lands mentioned in the affidavits in this cause to have been conveyed to him by the sheriff as therein stated, to the said Lawrence Sullivan, and that the said Archibald Ramsay do also pay to the said Lawrence Sullivan the costs of this rule to be taxed—the said Lawrence Sullivan being at liberty to retain such costs out of the amount so ordered to be paid by him as aforesaid. But in default of the said Lawrence Sullivan paying unto the said Archibald Ramsay what shall remain due to him as aforesaid, after deducting such costs as aforesaid, within the time aforesaid, it is ordered that the rule in this case be discharged, with costs to be taxed against the said Lawrence Sullivan, and that he be debarred from the benefit of redemption of and in the said lands.

LAWRENCE SULLIVAN V. ARTHUR RAMSAY.

Land Tax Act, 11 Vic. cap. 7, sec. 12—Offer to redeem made within two years sufficient—Rule to redeem may be taken out later—Legal tender.

The land was sold for non-payment of land-tax on 30th September, 1859. The affidavit of plaintiff's agent states that the redemption money was tendered on 24th May, 1861, and the rule to redeem was taken out on 7th January, 1862. The defendant shewed that no money was produced, and no offer was made which would amount to a legal tender. Against the application defendant contended (1) that as plaintiff did not take out his rule until after the expiration of the two years allowed to redeem he was too late, even though the tender had been made in time. (2) That no legal tender having been made the rule must be discharged.

Held. (Peters, J.) That it was sufficient to satisfy the statute if the tender was made within two years, even though the rule was not taken out until after the two years had elapsed.

2. Although an actual tender is not in all cases necessary, yet here there was no offer which could amount to a legal tender of any amount, and, therefore, the rule must be discharged.

21st~~st~~ January, 1862.

RULE to redeem lands purchased by defendant at sheriff's sale.

Mr. Johnstone shews cause.

Mr. E. Palmer follows.

The Attorney General, *contra*.

6th May, 1862.

PETERS, J. This case involved the same points as the last, to which it is not necessary to advert. But two other questions were raised.

The land was sold on the 30th September, 1859. Consequently the period for redemption expired on the 30th September, 1861. The affidavit of Cameron states that on the 24th May, 1861, he, on behalf of the plaintiff, tendered defendant £7 10s. as redemption money. The rule was taken out in Michaelmas Term, 1861.

It is contended that as the plaintiff did not take out his rule until after the expiration of the two years allowed

for redemption he is too late. It was urged that the two years allowed for redemption were analogous to a Statute of Limitations, and, therefore, not only must the owner tender repayment to the purchaser, but must also make his application to the Court within that time. But there is no analogy between this and the Statute of Limitations. The Statute of Limitations never begins to run until the time for payment has expired. Here the statute allows two years from the day of sale to repay the purchase money. If the owner tenders a sufficient sum on the last day, or hour of that day, he has a right to have back his land. If the purchaser refuses to give it back, then, and not till then, does the right to institute proceedings to compel him to do so arise. If the application must be made to the Court before the expiration of the two years, the time allowed for redemption might often be materially abridged. For instance, if payment were tendered the day after Michaelmas Term, where the two years would expire on the last day of December, he could not make the application until Hilary Term, and, therefore, according to this argument, he would lose his land, though he had really offered repayment two months before the two years had expired. Again, an owner might not know of the sale, or possess means to redeem until the last day of the two years. Is he, therefore, to be deprived of the privilege of redemption by the express words of the Act giving "during the space of two years from the day of sale," because he could not repay the amount, or was ignorant of the claim to be redeemed until just before the expiration of the time allowed for doing it?

It was urged that if the application to the Court could be made after the expiration of the two years, an owner who had made a tender might lay by for ten years before making his application. It is unnecessary now to consider how soon after the expiration of the two years the application to the Court in such cases must be made, as we think in this case it was made within a reasonable

time. Unreasonable delay might, perhaps, in this case, as in many other cases, be held a ground for refusing it. But no such inconvenience as urged really exists. The Act provides that an "equity of redemption" shall be open to the owner for two years to repay the purchase money and expenses, etc., "the same, in case of dispute, to be settled by the Supreme Court." There is nothing in the Act which restricts the jurisdiction of the Court to an application at the instance of the owner only. When a dispute has arisen the owner may obtain a rule calling on the purchaser to reconvey on payment of the amount to be fixed. Or the purchaser may obtain a rule calling on the owner to pay the amount or be debarred from redeeming. The Act never could have intended to create a jurisdiction for determining disputes between two parties to which both should not have an equal right to resort for settling a controversy which both were equally interested in determining.

It is next objected that no legal tender was made.

The affidavit of Cameron states that he tendered the defendant, Ramsay, £7 10s. in gold as repayment of the purchase money. Though this, if uncontradicted, might have been a sufficient allegation, it would have been more correct had the affidavit stated in what manner he offered the money, leaving the Court to judge of the validity of the tender. But the affidavit of the defendant, and also of Campbell, who was present at the time of the alleged tender, clearly shews that whatever Cameron's intention might have been he never produced any money or made any offer which could amount to a legal tender of any amount. We do not mean to hold that an actual tender is in all cases necessary. If a purchaser, for instance, refused to furnish an account of his demand the owner would not know what was due. In such case an offer and readiness to pay what the purchaser might be legally entitled to would be sufficient. Nor do we wish to be understood as holding that the right of redemption would,

in all cases, be barred in consequence of a tender being something less than the amount afterwards allowed by the Court, if satisfied that the tender had been made with the *bona fide* intention of paying the amount really believed to be due, though on the question of costs it would, as in other actions, be decisive.

But we think, that where no refusal of an account, or other circumstance which might excuse a tender, appears, the owner is bound to make a legal tender of the amount which he must or might know could legally be claimed. A purchaser might reasonably decline agreeing to an amount which the owner might exercise the option of paying or not, which if offered in money he would have accepted, and we are, therefore, of opinion that the rule in this case must be discharged.

The order, therefore, is that the rule in this case be discharged with costs, and that the plaintiff, Lawrence Sullivan, be debarred from any equity of redemption in the lands, in the affidavit in this cause mentioned to have been conveyed by the sheriff of Prince County to the defendant, Arthur Ramsay, as therein stated.

HEARD V. PHILLIPS.

Absent Debtor Act—A person in possession of choses in action of absent debtor is not chargeable as garnishee.

RULE nisi for garnishee's discharge and for non-suit.

28th January, 1862.

Mr. Charles Palmer shews cause.

The Attorney General, *contra*.

6th May, 1862.

PETERS, J. In this case it is unnecessary to consider many points raised on the argument, as from the defendant's examination it appears that the assets assigned to him consisted of goods and chattels to the value of £914, and debts due from third persons amounting to £607, a very small part of which has been collected. The amount due, for the payment of which the assignment was made, (not including £497 which the garnishee states he had to pay to previous incumbrancers to preserve his bill of sale) is about £1300. It is clearly laid down by both Cushing and Drake that a person having in his possession choses in action, cannot, in respect thereof, be charged as garnishee. In this case, therefore, the defendant was not liable to be proceeded against in respect of the £607 of debts, and deducting that amount there would clearly be no balance left to which the absent debtor, Bradly, could have a claim, and for which his creditors could garnish the defendant.

The rule for a non-suit must, therefore, be made absolute.

THE QUEEN V. EDWARD WHELAN.

Libel—Criminal information.

Where the libel charges the person libelled with having, by a previous writing, provoked it, the latter, by his affidavit on which he moves for a criminal information, is bound to answer it, otherwise the affidavit is insufficient, and the rule must be discharged.

RULE nisi for a criminal information.

8th May, 1862.

The defendant in person shews cause.

Mr. E. Palmer, *contra*.

Cur. ad. vult.

24th June, 1862.

PETERS, J. This was a rule calling on the defendant to shew cause why a criminal information should not issue against him for a libel on William Pope, published in the "Examiner" newspaper, of which the defendant is proprietor.

The explanation given by the defendant of his meaning of the word "arraigned," on which the criminal character of the charge made against Mr. Pope in the article complained of chiefly depends, raised some doubts in our minds on the argument, but we are satisfied that that explanation would not be a sufficient answer to the application.

The libellous article, however, clearly charges Mr. Pope with being the author of a previous article in the "Islander," to which the article complained of is evidently a reply. The defendant also swears that it was published in reply to that article which he then, and yet, believes to have been written by Mr. Pope.

The principle which governs the Court in applications of this nature appears to be that the party applying for a criminal information must come into Court with clean hands. He must not only shew himself innocent of the

charge made against him, (that is most fully and satisfactorily done here) but he must not appear to have done anything to provoke the attack of which he complains.

In the case of *Rex v. Taylor* (1), where a rule was obtained against the defendant, who was proprietor of the "Manchester Guardian," for a libel on Mr. Royas, the alleged libel insinuated that certain articles in the "Manchester Chronicle" emanated from Mr. Royas. The defendant does not appear to have used any affidavit in reply.

Tollet, in shewing cause, submitted that as there appeared to be a controversy between the two newspapers, there should have been a more explicit denial by Mr. Royas that he had any knowledge of the articles in the "Manchester Chronicle" before they appeared. And on that ground, viz., that the applicant's affidavit did not deny knowledge of these articles, the Court discharged the rule.

Mr. Pope in his affidavit makes no denial of his authorship of the article in the "Islander," attributed to him in the libel. And we think this case of *Rex v. Taylor* (1), is, therefore, conclusive against the rule.

One difficulty suggested itself to our minds in applying the principle broadly laid down in this case to all cases. And it was this, viz., that the article alluded to in the libel, as provoking it, might really be a severe, but merited and justifiable criticism on an improper publication. And although the doctrine of *Rex v. Taylor* (1) appeared to us conclusive against the application, we delayed giving a decision at the last term that we might have an opportunity of looking further into the authorities than the short period between the argument and the rising of the Court permitted. But further investigation has only confirmed the opinion we then formed.

The doctrine appears to be that where the libel, either directly or by insinuation, charges the applicant for the

(1) 1 Jur. 52.

rule with having, by a previous writing, provoked it, he is bound in his affidavit, on which the rule is moved, to answer it. This he may do by denying that he is the author, or by admitting it, and then setting out the article in his affidavit, or in some other way shewing the Court that it was a proper and justifiable criticism or communication, and not of a nature that could reasonably provoke such a severe retort.

Neither of these courses has been adopted here, and we, therefore, think the affidavits are insufficient, and that this rule must be discharged, but, under the circumstances, without costs, and that Mr. Pope shall be at liberty to proceed either by indictment or action if he shall see fit.

THE QUEEN V. EDWARD WHELAN.

Libel—Criminal Information.

A party seeking a criminal information against another must himself be free from blame.

RULE nisi for a criminal information.

3rd November, 1862.

Defendant in person shews cause.

Mr. E. Palmer, *contra*.

Cur. ad. vult.

26th January, 1863.

PETERS, J. This was a rule to shew cause why a criminal information should not be granted against the defendant, the proprietor and editor of the "Examiner," for a libel on William Pope.

The defendant, in his affidavit, in answer states that the plaintiff is well known to be the editor of the "Islander" newspaper, wherein attacks of a very gross, malicious and libellous nature are, from time to time, made on the character of the defendant in his private as well as public capacity, one of which was published in the "Islander" of the 30th, signed "Responsis." He sets out in his affidavit and alleges that he believes that it was published with the knowledge and concurrence of the prosecutor. The defendant, in the close of his affidavit, also alleges that the prosecutor is in the frequent habit of libelling him. From the affidavits it appears that the prosecutor and defendant are the two editors of two rival newspapers, and are in the habit of writing with much acrimony against each other. The article signed "Responsis" set out as in the "Islander" of the 3rd October, contains a charge against the defendant of a nature similar to that with which the prosecutor complains the defendant has charged him.

It was urged that there was no proof that Pope was the author of the article signed "Responsis," or concurred

in it, and that as it appeared as an anonymous communication and not as an editorial, it should not be presumed that he wrote or concurred in it. In the nature of the thing such proof by the defendant was next to impossible; but the defendant swears he believes it was published with his concurrence and knowledge. On an application of this kind the Court is bound to weigh the probabilities, and looking at the circumstances that it is evidently a reply to the libel now complained of, and published in the paper of which the prosecutor is editor, we think we may reasonably presume that he was, at least, not ignorant of it.

—In *The Queen v. Lawson* (1), where on an application for a criminal information for a libel by the foreman and several of his fellow jurors, it appeared that the foreman had published a letter commenting in strong terms on the publishers of the libel, though, as it appeared, without the request, knowledge, or concurrence of the other jurors who did not see the letter, and were not aware that any such letter had been sent till after he had sent it. The Court, believing from the circumstances that the other jurors knew (in sufficient time to have interfered) of the foreman's intention to publish the letter on behalf of himself and fellows, discharged the rule.

In the present case (even if the article signed "Responsis" was not written by or with the concurrence of Mr. Pope) we cannot doubt that, being an answer to an attack upon himself, he must, as editor of the paper, have been informed of it in time to have prevented its publication, and he, therefore, must be affected by it in the same manner as the jurors were affected by the unauthorized publication of their foreman.

The defendant's affidavit also contains another distinct allegation that the prosecutor is in the frequent habit of libelling him.

(1) 1 Q. B. 486.

Under these circumstances the prosecutor, in our opinion, comes clearly within the rule adverted to by the Court on a similar application, recently determined between the same parties, viz., that the party seeking a criminal information against another must himself be free from blame. We think he is not so here, and, therefore, the rule must be discharged.

It was urged that the prosecutor had no opportunity of answering the defendant's affidavit, but this is always the case with respect to affidavits used in shewing cause against rules nisi. And in *The Queen v. Gregory* (1), on application for a criminal information, we find Lord Denman giving credence to affidavits to which a similar objection was urged.

The rule must, therefore, be discharged, but without costs, and the prosecutor shall be at liberty to proceed either by indictment or action, as he shall see fit.

(1) 8 Ad. & Ell. 909.

THE QUEEN v. WILLIAM THOMPSON & JOHN WALSH.

Jury de mediatate linguæ.

If the right to a jury *de mediatate linguæ* ever existed in P. E. Island it is abolished by the Island Jury Act.

APPLICATION by defendant, Thompson, for a jury *de mediatate linguæ*, on his trial for larceny.

15th January, 1863.

Mr. Johnstone, for defendant, addresses the Court in support of the rule.

PETERS, J. In the case of *The Queen v. Williams* (1), we held that an alien was not entitled to a jury *de mediatate linguæ*, because our Jury Act expressly provides that the jury for the trial of all civil and criminal cases shall be liege subjects, and also adopts an entirely new system of choosing jurors, and having made no exception in favor of an alien's right to a jury *de mediatate linguæ*, that right, if it ever existed in this colony, is abolished.

The same effect appears (as Blk. Com. thinks unadvisedly) to have been provided by 25 Geo. 3, cap. 25, on the alien's right to such a jury in civil suits. By the 28 Edw. 3, cap. 13, aliens in civil as well as criminal trials were entitled to a jury *de mediatate linguæ*. But the 25 Geo. 3, cap. 25, having made new provisions for empanelling of jurors in civil cases, without any saving clause respecting an alien's right, was held to repeal that part of the 28 Edw. 3, relating to civil suits. And in the English Statute, 6 Geo. 4, cap. 50, which makes new provisions for empanelling jurors in both civil and criminal cases, the right in criminal cases is preserved by express provision. It is also observable that the 1st Ph. & M. cap. 10, which was held to deprive aliens of the right in cases of treason, only contains general words, that persons accused of treason shall be tried according to the course of the Common Law.

(1) Not reported.

The Attorney General in this case offered to waive any objection to the motion and to allow the defendant to have a jury *de mediatate linguæ*. But it is laid down 2 Com. Dig. 183, “and a trial *per mediatatem linguæ* where it ought not to be is not good though by consent for that shall not alter the law.” *Sherley’s case* (1).

(1) 2 Dyer 144; 2 Hawks, 590.

LAWRENCE SULLIVAN V. HUGH CARR & H. & J. RAMSAY.

Land Tax Act — Redemption — Tender when purchaser has secretly assigned to third party

C. bought at land-tax sale and subsequently conveyed to Ramsays, but no notice of the conveyance was given to the former owner. Ramsays lived with their mother, who had been the lessee and should have paid the tax, and C. was her son-in-law. DeBlois, S.'s agent, tendered the redemption money to C. subsequent to the latter's conveyance, and in ignorance of it, but it was refused. C. and his brother, in their affidavit, asserted that DeBlois, when making his tender, did not express that he was making it for the plaintiff, and that he did not refer to him as owner of the land, and hence it was insisted the tender was bad. Under the circumstances it was clear that Carr knew that plaintiff was owner.

Held. (Peters, J.) That the tender was good, and the plaintiff entitled to redeem notwithstanding the assignment to Ramsays.

APPLICATION to redeem land sold for non-payment of land-tax.

3rd November, 1862.

Mr. Johnstone shews cause.

Mr. E. Palmer follows.

Mr. Haviland, *contra*.

Mr. Brecken follows.

Cur. ad. vult.

26th January, 1863.

PETERS, J. This was an application to redeem land sold for non-payment of tax under 11 Vic. cap. 7. From the affidavits it appeared that Hugh Carr became the purchaser at the sale of two hundred and thirty-six acres of land (which is now sought to be redeemed) for the sum of £2 10s. The plaintiff's agent, in his affidavit, swears that on the 21st day of May, 1861, he, in the name and on the behalf of the plaintiff, tendered £9 to defendant, Hugh Carr, as the redemption money, which he refused to accept. On this affidavit a rule nisi was granted against Hugh Carr, but on shewing cause he deposed that before

the tender he had sold and conveyed the land to Hugh and John Ramsay, whereupon the rule was enlarged and amended by making them parties. And cause was shewn at the last term on behalf of all the defendants.

The 8th section of the Act provides that no conveyance made under the Act shall be valid unless registered within twelve months of the day of sale, a provision absolutely necessary to enable the owner to find out to whom he is to tender repayment of the purchase money. If the purchaser were allowed after registering his deed, by merely conveying the land to another, to divest himself of that character and thereby prevent the tender of repayment being made to himself, the intention of the Act evidently might be defeated. Because if the purchaser's assignee did not record his deed, and gave no notice of it to the former owner, as appears to have been the case here, the former owner might not, until after the period for redemption had expired, be enabled to ascertain to whom he should tender repayment. It is clear, therefore, that in this case the tender of repayment to Carr was sufficient to prevent the title of either himself or Ramsay becoming absolute. Indeed this point was scarcely insisted on at the bar.

The point chiefly insisted on was this. Hugh Carr and his brother, Donald Carr, in their affidavits, state that when DeBlois, the plaintiff's agent, made his tender he did not express that he made it in the name and on the behalf, or as the agent of the plaintiff, and that when he exhibited the money to the defendant he did so without naming or referring to any person as owner or proprietor of the land. And for this reason it was insisted that the tender was bad. But the affidavit of DeBlois, and also of Cameron, who was present, state that it was made in the name and on the behalf of the plaintiff. No particular form of words is necessary in making a tender. It is enough if the party understand on whose behalf it is made. And if he had intended to rely on that as a

defence he should have distinctly sworn that he was ignorant and really did not understand on whose behalf DeBlois acted in making the tender. If evidence on this point was necessary the affidavit of Cameron would be conclusive. From it, it appears that the principal part of the land in question is a farm called Rose Hill. That one John Ramsay, the father of the defendants, Hugh and John Ramsay, (who has been long since dead) was, in his lifetime, tenant thereof to the plaintiff; that ever since his death they have continued to reside with their mother, Martha Ramsay, and that defendant, Hugh Carr, is married to their sister, and that Martha Ramsay, since her husband's death, hath been and still is tenant to the plaintiff.

Here then we have the son-in-law buying in his mother-in-law's farm for 50s. for the non-payment of a tax which she, as the tenant and occupier, should have paid, and then conveying it to her sons, who have always resided with her on the farm. Under these circumstances it is absurd to suppose Hugh Carr could have been ignorant of the plaintiff's claim to the land.

The plaintiff is, therefore, entitled to redeem, and as the defendants have furnished no account of their claim, but have resisted the application on general grounds, the amount tendered must be deemed sufficient, and the rule must be made absolute with costs.

The order will, therefore, be, that the said Lawrence Sullivan do, within two calendar months after the date of this order, pay to the said Hugh Ramsay and John Ramsay the sum of nine pounds, or as much thereof (if any) as shall remain due after deducting costs hereinafter mentioned; and that thereupon the said Hugh Carr, Hugh Ramsay, and John Ramsay, do reconvey the lands mentioned in this cause to have been conveyed to the defendant, Hugh Carr, by sheriff's deed, and by him, the said Hugh Carr, sold and conveyed to the said John and

Hugh Ramsay, as therein stated, to the said Lawrence Sullivan. And it is further ordered that in such conveyance a proviso be introduced that such conveyance shall not prejudice, affect, or make void any right or claim which the said John and Hugh Ramsay, or either of them, now or hereafter may have to the said premises, or any part thereof, under or by virtue of any lease thereof granted by the said Lawrence Sullivan, or any person or persons through whom he claims. And that the said Hugh Carr, John Ramsay, and Hugh Ramsay do also pay to the said Lawrence Sullivan the costs of this rule to be taxed. The said Lawrence Sullivan being at liberty to retain such costs out of the amount so ordered to be paid by him as aforesaid. But in default of the said Lawrence Sullivan paying unto the said Hugh Ramsay and John Ramsay what (if anything) shall remain due to them as aforesaid, after deducting such costs as aforesaid, within the time aforesaid, it is ordered that the rule in this case be discharged, with costs to be taxed against the said Lawrence Sullivan, and that he be from thenceforth debarred from the benefit of redemption in the said lands. Dated this twenty-sixth day of January, 1863.

REDDIN V. JENKINS.

Registry Act - Judgments binding land - Prior unregistered deed.

In May, 1856, L. conveyed certain lands to J., but the deed was not registered until April, 1860. Subsequent to the execution of the deed, but before registration, certain judgments were recovered in the Supreme Court against L., but no memorial was registered. In 1859 defendant exchanged these lands for lands of the plaintiff, and a good clear title was to be given, and defendant tendered a deed which plaintiff refused to accept on the ground that the judgments recovered against L. previous to the registration of the deed from him affected the title. The question raised was, whether a judgment, no memorial of which was on record, bound lands previously conveyed to a *bona fide* purchaser who had neglected to register his conveyance until after the judgment was entered up.

Held. (Peters, J.) That such a judgment would not bind the lands.

SPECIAL case as to effect of a judgment, no memorial of which was registered, on lands previously conveyed to a *bona fide* purchaser whose deed was not registered.

3rd November, 1862.

Mr. McLeod for plaintiff.

Mr. Charles Palmer follows.

Mr. Edward Palmer, *contra*.

Cur. ad. vult.

26th January, 1863.

PETERS, J. From the facts stated in the special case, submitted in this cause, it appears that one William Lobban, by deed executed on the third of May, 1856, but not registered until April, 1860, conveyed certain lands therein described to Jenkins. That in 1859 the defendant exchanged these lands with the plaintiff for certain other lands owned by him. That by the agreement the title to the defendant's lands was to be clear and marketable. That the plaintiff has conveyed his land to the defendant, and that the defendant has tendered a conveyance of the land mentioned in the deed of May, 1856,

to the plaintiff, which he refuses to accept in consequence of their being certain judgments entered up in the Supreme Court against Lobban subsequently to the execution of the deed of the third of May, 1856, but previous to its registry. That no memorial of these judgments is registered in the Registry Office.

The question raised, therefore, is whether a judgment (no memorial of which has been recorded in the Registry Office) binds lands previously conveyed to a *bona fide* purchaser who has neglected to register his conveyance until after the judgment has been entered up. The question, as affecting real estate, is an important one.

The 10th section of 3 Wm. 4, cap. 10, which provides that no unregistered deed shall defeat any deed of the same lands duly registered, contains a proviso that the Act shall not affect judgments, although no memorial thereof be recorded in the registry, "but such judgments shall have the same effect as if this Act had not been made." On the execution of a deed (and without registry) the estate in the lands passes to the grantee. As the Act leaves judgments in the same plight as if the Act had not been made, and as at Common Law the judgment only binds lands to which the defendant, at the time of its entry, was entitled, it is clear that a judgment against the grantor cannot bind lands which he has previously conveyed, because at the time of this judgment being entered up the estate in the land so conveyed was vested in another.

The effect of the proviso is merely to protect judgments entered previous to the execution of a conveyance, and which, therefore, bound the defendant's land, from being subsequently defeated by the operation of the statute on the registration of the conveyance.

But the 12 Vic. cap. 2, enacts "that judgments already entered up, or hereafter to be entered up against any person in the Supreme Court, shall operate as a charge

upon all lands of or to which such person was, or shall be at the time of entering up such judgment, or was, or shall be at any time afterwards seized or entitled for any estate, whether in reversion, remainder, or expectancy, or over which such person at the time of entering up such judgment, or at any time afterwards had, or shall have any disposing power which he might, without the assent of any other person, exercise for his own benefit."

It was urged that if Lobban, at the time the judgment was entered, had executed a deed to another who had registered it, it would convey the estate, notwithstanding the previous conveyance to Jenkins, and that, therefore, Lobban must be considered at that time to have had a disposing power.

But the deed would, in that case, have operated, not by virtue of any seisin passing from Lobban, (for that had already passed from him to Jenkins by the deed of May, 1856) but by virtue of the Act of 3 Wm. 4, cap. 10.

The disposing power mentioned in the Act must mean a disposing power which may be exercised lawfully and without fraud, which the Act could never have intended to render it legal to commit, though from policy it protects the innocent vendee, whose deed is registered, from being affected by it. The finder of a bag of money, with the owner's address on it, acquires, by such accidental possession, power to pass it away, and so may be said to have a disposing power over it. Yet in doing so he would be guilty of larceny.

Besides the disposing power mentioned in the Act must be one which a person may exercise in any manner he pleases for his own benefit. Suppose Lobban, after the conveyance to Jenkins, had executed a deed of the land to trustees for his own benefit, which they record, could it be argued that it would defeat the previous unregistered deed?

We think the judgments mentioned in the case do not bind the lands conveyed by the deed of May, 1856, to the defendant, and, therefore, judgment must be for the defendant. *Vide Wickam v. The New Brunswick and Canada Railway Company* (1).

(1) L. R. 1 P. C. 64; S. C. 35 L. J. P. C. 6.

DON DEM R. B. STEWART V. DUNCAN MCPHEE.

Ejectment—Condition of re-entry for want of property to distrain—Tenant denying to bailiff that there was property to distrain. not estopped from showing the truth at the trial—His credibility a question for the jury.

Ejectment on a condition of re-entry for want of property to distrain. The bailiff had been sent to search the premises, and had also a demand in ejectment to serve if no property should be found on which to levy. He found nothing, but on passing a hovel he asked defendant if there was any property there, and defendant said there was not, and the bailiff did not search it, and served the demand in ejectment. On the trial the defendant did not dispute his former denial that there was property, but proved that there was sufficient to satisfy half a year's rent. Plaintiff contended that defendant was estopped from denying the truth of his statement to the bailiff. At the trial the judge held defendant was not estopped, and plaintiff submitted to a non-suit. A rule nisi to set the non-suit aside and for a new trial was granted on the ground that defendant was estopped.

Held, (Peters, J.) That defendant was not estopped, but that the rule should be made absolute on the ground that plaintiff had a right to have the credibility of defendant's testimony in contradicting his former statement submitted to a jury.

APPLICATION to set aside a non-suit on the grounds set out in the judgment.

27th and 28th January, 1863.

Mr. Johnstone shews cause.

Mr. McLeod, *contra*.

Mr. Charles Palmer follows.

Cur. ad. vult.

11th May, 1863.

PETERS, J. This was an action of ejectment on a condition of re-entry under the statute for want of property whereon to distrain.

From the evidence of the bailiff it appeared that he was sent to search the premises, and also with a declaration in ejectment to serve in case no property was found. That in going to the premises he met the defendant and

informed him of his intention. He proceeded to search the premises, and found nothing. That while engaged in the search on passing a hovel he asked the defendant if there was any property in it, to which he replied that there was not, and the bailiff passed on without searching it, and then served the ejectment. The defendant did not dispute his having given the answer, but proved that there was, at the time, on the land property sufficient to satisfy half a year's rent. The plaintiff was not prepared to contradict this statement, but contended the defendant was estopped from controverting the truth of his statement to the bailiff. The judge was of opinion that he was not estopped, and expressed a strong opinion on the case against the plaintiff, who submitted to a non-suit.

A rule was granted to shew cause why the non-suit should not be set aside and a new trial granted, and we are indebted to the counsel on both sides for a careful and elaborate research into the authorities, as well as for the acute and lucid manner in which they have been commented on, and by which we found ourselves materially assisted in considering the question.

The conclusion we have arrived at is that, under the circumstances of this case, the defendant was not estopped from shewing that there was property in the hovel which might have been distrained. It is a maxim of law that no man shall take advantage of his own wrong. And there can be no doubt of the soundness of the principle founded on that maxim, that he who wilfully, by his words or conduct prevents a thing being done, shall not, either as plaintiff or defendant, avail himself of the non-performance he has occasioned. But the question here is, whether the representation was such as, under the circumstances, a bailiff would naturally rely upon, if it was not the defendant can scarcely be said to have occasioned the non-performance of the act.

Now what are the facts? In searching for property to distrain the bailiff passes a hovel (not appearing to be a

place where anything could be found); he asks the defendant if there is anything in it, and the defendant replies there is not. The defendant does not appear to have used any artifice or other means to induce him to abstain from searching the hovel. No authorities with which we are acquainted go the length of holding that a mere untrue answer to a question which a party has no right to put, shall prevent the party answering from afterwards shewing the truth in his defence.

Here the defendant was under no legal obligation to assist the bailiff, and he was under a pressure when men are naturally disposed to shield their property if they can. From the question asked he might naturally infer that the bailiff did not think the hovel worth searching, and would likely pass it by. He was not bound to answer. But it is argued that if he did he must answer truly. In some cases such an obligation may indeed exist, but in many cases so strict an adherence to sound morals is not required. Thus in *Vernon v. Keys* (1), Lord Ellenborough says, "this appears to be a false representation in a matter *gratis dictum* by the bidder in respect to which the bidder was under no legal pledge or obligation to the seller for the precise accuracy and correctness of his statements, and upon which, therefore, it was the sellers own indiscretion to rely." Besides, here the question placed the defendant in this dilemma. If he answered in the affirmative he, in reality, assisted the bailiff by leading him to the property. If he was silent, his reluctance to answer might raise a suspicion in the bailiff that would lead to a similar result, and, therefore, to prevent himself from being, by his words or conduct, made instrumental in altering the bailiff's intention of passing the hovel without search, he might feel it necessary to answer as he did.

The soundness of C. B. Pollock's *dictum* in *Bowes v. Foster* (2), "that a man who, under the pressure of dis-

(1) 12 East 632; affirmed 4 (2) 2 H. & N. 779. S. C. 27 L. Taunt. 488. J. Ex. 262.

tress and misfortune, makes a misrepresentation is not in the same *delictum* as the man who does so without such motive," may, as a rule for general application, be open to question; but there can be no doubt of its appositeness to a case where, by the words or conduct of one party, another, to avoid compromising himself, is reduced to the necessity of making a false statement which it is afterwards sought to estop him from contradicting.

The rule as laid down by Lord Denman in *Pickard v. Sears* (1), requires that the statement must be made under such circumstances as would naturally induce the party acting on it to believe its truth. Now, no reasonable man, really anxious to find property to distrain, would give much credence to a tenant's statement made under the circumstances in which the defendant was placed. Although if his real object were to lay the foundation for an ejectment it would further his purpose to act on the assumption of its truth, to avoid the discovery of property, small, compared to the rent due, yet sufficient to destroy the foundation of the contemplated action.

The American case, *Presbyterian Congregation v. William G. Wendell*, was much relied on for the plaintiff. There the defendant, in an action of ejectment, brought on a condition of re-entry for non-payment of rent without sufficient distress on the premises, had declared at the time of the distress made that the property on the premises did not belong to him, and it was held that he was estopped from shewing at the trial that it did. But in that case the false statement arose in the wilful and voluntary conception of the defendant, made for the fraudulent purpose of inducing the plaintiff to give up goods then in his possession, which he had a legal right to retain, and was not elicited by a previous question. The plaintiff, under the circumstances, would, naturally, believe the statement to be true, and could have no

(1) 6 A. & El. 469.

ent means of ascertaining it to be false. Here the
 ment is elicited by an unauthorized question put to
 e in whom the questioner had no right to repose con-
 fidence, and whose position must tempt him to answer
 truthfully, and, respecting a subject matter then present, the
 examination of which would have tested its correctness.
 If in such a case a party neglects the higher evidence of
 ocular demonstration, and trusting to the answer, omits
 the performance of a necessary act, he seems prevented
 from performing it rather through his own indiscretion
 than by any wilful misrepresentation of the defendant.
 Such a case comes clearly within the rule laid down by
 Story (1), "that it is not every wilful misrepresentation,
 even of a fact, which will avoid a contract upon the
 ground of fraud if it be of such a nature that the other
 party had no right to place reliance on it, and it was his
 own folly to give credence to it, for Courts of Equity,
 like Courts of Law, do not aid parties who will not use
 their own sense and discretion upon matters of this sort."

A case was put by Mr. C. Palmer of a tenant telling a
 bailiff that he did not wish him to enter a private room,
 and that there was nothing in it. It was asked, might he
 not in such case rely on the statement and omit the
 search? Unquestionably he might. That would be like
 the case of the drawer of a foreign bill (to save expenses)
 requesting the holder not to present it, who is afterwards
 prevented from objecting to the want of protest in an
 action on the bill. So in the case put, the tenant would
 not be allowed to insist on the non-performance of an act
 omitted to be done for his benefit and at his request, nor
 to contradict the truth of the statement by which he
 induced the non-performance. In such cases there is an
 implied agreement that if the one party will omit to do
 the act the other will not object to the omission.
 It is unnecessary to refer particularly to all the cases
 cited at the bar where admissions or representation have

(1) 1 Equity 199.

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been held binding on the parties making them. In all, the relative position of the parties, with respect to the transaction or subject matter, was such as entitled the party deceived to expect correct information from the party making the misrepresentation, or there was a suppression of facts which, under the circumstances, the party was bound in conscience and duty to disclose, or he was silent when he was bound to speak and give notice of his claim.

We think, however, that the non-suit was incorrect, the defendant having given evidence to contradict his former statement, the plaintiff had a right to have the credibility of his testimony submitted to the jury. The rule must, therefore, be absolute for a new trial, but the costs to abide the event. This course cannot prejudice the defendant, for, if on the second trial the jury believe him, he will have a verdict and the costs of this rule will be taxed to him, and if they disbelieve him he cannot complain that he has been prevented from profiting by his own falsehood.

Rule absolute. Costs to abide the event.

LAWRENCE SULLIVAN v. H. CARR & H. & J. RAMSAY.

*Attachment for not executing deed as ordered by the Court—
Defendants evading tender of deed—Deed ordered to be
deposited with their attorney for execution.*

The defendants threw obstacles in the way of serving the order made in this cause (ante p. 228) and of tendering the deed therein mentioned for execution, and the Court ordered the deed to be deposited with their attorney for execution. They did not execute it, and a rule nisi for an attachment was granted.

Held, (Peters, J.) That the rule must be made absolute, but no attachment to issue for thirty-two days. and then only against such defendants as should not, by that time, have executed the deed.

APPLICATION for attachment for contempt for not executing deed as ordered by the Court.

27th January, 1864.

Mr. Johnstone shews cause.

Mr. Edward Palmer follows.

Mr. Haviland, *contra*.

Mr. Brecken follows.

Cur. ad. vult.

28th January, 1864.

PETERS, J. The order to execute the re-conveyance was made in Hilary Term, 1863 (1), but the plaintiff's attorney, in consequence of obstacles thrown in his way by defendants, could not succeed in serving the order and tendering the deed for execution. In Easter Term, on affidavit of facts shewing attempts to serve, the Court ordered that the deed ordered by the rule of Hilary Term should be deposited with defendants' attorney, and should be executed by them within a certain time. This rule was duly served on all the defendants and their attorney, and the deed deposited with him. The defendants did not execute it, and a rule nisi for an attachment was granted. In shewing cause the defendants' counsel produced affidavits to shew that they did not oppose obstacles

(1) Ante p. 228.

to prevent plaintiff serving the rule and tendering the deed for execution by them. On hearing all the affidavits we are satisfied that there was ample ground for inducing the Court to fix the office of the defendant's attorney as the place where the deed should be deposited for their execution.

But the defendants' counsel object that the rule nisi, by its wording, only calls on them to shew cause against the rule of Hilary Term, and there being no previous service of that rule, defendants cannot be put in contempt, and that they are not bound on this rule to answer for not obeying the rule of Easter Term, and then to compel them to do so would be to take them by surprise. But we think the order of Hilary Term is the foundation of the whole proceeding. It was that order which directed the defendants to convey, but no place for execution of the deed being named in it, it became necessary for the plaintiff's attorney to seek out the defendants and tender it to them for execution. The order of Easter Term is merely supplementary, for in fixing a particular place where the deed should be left for execution by the defendants, leaves the original order still in force which bound them to re-convey.

But it is further urged that the rule nisi is drawn up on reading "rule and affidavit," and that this must be held to refer to the rule mentioned in the body of the order, viz., the rule of Hilary. But on looking at the papers it appears clear that such could not have been the case, as there never was any rule served but that of Easter, with which the defendants and their attorney were served, and on the reading of which rule and affidavit this rule nisi was granted. Under these circumstances it is absurd to suppose that the defendants and their attorney could be taken by surprise, or could suppose that they were not called on to excuse themselves for not executing the deed deposited with their attorney.

The rule must, therefore, be made absolute. But as the wording of the rule nisi afforded some ground for doubt on which the defendants' counsel seem to have resisted the rule, the order will be that no attachment do issue thereon until after the first day of March next, and then that such attachment do issue only against such of the defendants as shall not, on or before that time, have executed the deed of re-conveyance now deposited with Mr. E. Palmer, their attorney.

THE QUEEN V. CHARLES, WILLIAM & ARTEMAS LORD.

Seashore—Nuisance—Right of riparian owner to make erections between high and low water marks—His right to seaweed—Public have right of navigation and of fishery, but not absolute right of way.

The defendants were indicted for a nuisance in erecting a weir for the purpose of collecting seaweed, which the jury found to be in front of their farm, on the space between ordinary high and low water marks, which space had been used for fifteen years by the neighbors as a road for hauling seaweed, etc. The space had once been sand hill belonging to defendants farm, but was now washed away and covered with water at ordinary high tides. A highway sufficient for all necessary purposes existed inside the inner end of the weir, though not at the outer end, and the general public were not impeded by the weir in travelling. hauling or getting seaweed, or anything to which they had a right on the shore. The question was whether the facts so found amounted to a verdict of guilty. The important point raised was whether the riparian owner "can place such an erection on the shore in front of his land, below ordinary high water mark, for the purpose of collecting seaweed floating on the water, or securing it when relicted, without being guilty of a nuisance for obstructing a highway." For the Crown it was contended that the sea shore, between high and low water marks, is a common public highway, over every part of which the public have a right to travel, and that an erection obstructing such way is a nuisance equally as much as if erected on a highway on land. Defendants contended that they had the right to collect seaweed floating on the sea or lying on the shore between high and low water marks, and, therefore, had the right to use such means as they thought best for collecting and securing it, so long as a sufficient way was left, and the public were not really injured.

Held, (Peters, J.) Even assuming the public to have a right of way over the space between high and low water marks, yet the use of the space was not limited to that right, and when, as here, the public right was not injured, the riparian owner had a right to make such erections as he required.

2. The riparian owner has a right in common with the public to take the seaweed when floating in the sea, and has the exclusive right to it when deposited on the shore, and to avail himself of that right may use such contrivances as he likes, so long as he

does not practically interfere with the rights of the public on the shore.

3. The public right over the space between high and low water marks is not the absolute right of way as claimed, but is that of navigation and the liberty of fishing.

INDICTMENT for a nuisance. A verdict had been found for the defendants on the grounds set out in the judgment, and a motion was made to set this verdict aside and for a new trial.

28th and 29th January, 1864.

The Attorney General for the Crown supports the motion.

Mr. Brecken follows.

Mr. Longworth, Q. C., *contra*.

Mr. Charles Palmer follows.

The Attorney General replies.

Cur. ad. vult.

3rd May, 1864.

PETERS, J. This was an indictment for a nuisance. The defendants had erected a weir on the sea shore in front of their farm for the purpose of collecting seaweed. At the trial certain questions were by consent left to the jury. and answered as follows :

1. Whether the site of the weir, erected by the traversers on the shore of Cumberland Cove, is between ordinary high and low water mark? Ans. The greater part of it is.

2. How long, and for what purposes, and by whom has the said space between ordinary high and low water mark been used? Ans. Fifteen years, for hauling seaweed, stone and shell-fish, by the neighbors.

3. Whether the site on which the weir is erected from end to end in every part of it was, at any former period, sand hill land, or marsh land, belonging to the farm occupied by Charles Lord, one of the traversers, although now washed away and covered by water at ordinary high

tides? Ans. It was sand hill, and belonged to the farm occupied by Charles Lord, one of the traversers.

4. Whether a sufficient highway for horses, carts and carriages, does, or does not exist, between the head or commencement of the weir erected by the traversers, and the front or marsh of Charles Lord's farm on Cumberland River? Ans. There does exist a sufficient highway.

5. Whether a highway, sufficient for horses, carts, and carriages, does or does not exist at the outer end of the weir erected by the traversers on Cumberland Cove? Ans. There does not exist a sufficient highway.

6. Whether, by the erection of the weir by the traversers in Cumberland Cove, the public, generally, are impeded in travelling, hauling, or in any way however, in getting seaweed, stone, shell-fish, or any other thing to which the public at large have a right on the shore at Cumberland Cove? Ans. They are not impeded.

The question now is, whether the facts so found amount to a verdict of guilty. It was contended by the defendant's counsel that the shore on which the weir was erected having been once comprised in the defendant's farm, there was nothing in the finding to shew that the encroachment of the sea had been of that gradual kind which would deprive the owner of his right to the soil now overflowed. But without deciding this point we think it more advisable that our decision should be given on the general and more important question raised by the Attorney General, viz., whether the owner of land can place such an erection on the shore in front of his land, below ordinary high water mark, for the purpose of collecting seaweed floating on the water, or securing it when relicted, without being guilty of a nuisance for obstructing a highway?

The Attorney General contends that the sea shore, between high and low water marks during the reflux of the tide, is a common public highway, and that the public

have a right to travel over every part of it, and, therefore, an erection which obstructs the way, or any part of it, is a nuisance in the same way as if it was a highway on land.

For the defendant it was contended that he has the right to collect seaweed floating on the sea, or lying on the shore, between high and low water marks, and, therefore, he has the right of using such means as he thinks fit for collecting or securing it, provided a sufficient way is left so that the public are not really injured.

Assuming the public to have a right of way on the shore between high and low water mark when the tide is out, it will be convenient, in the first place, to examine whether there is a complete analogy between it and a highway by land. In the case of a highway by land, whether created by dedication or user, it is, in its nature, applicable, and must be presumed to have been intended to be used only for one specific purpose, viz., to allow the public to pass along it, and as it cannot be presumed that more than was necessary for that purpose was either given or taken, the right of passing extends over every part of it without being liable to abridgment or interference from the exercise of other lawful but subservient rights, *William v. Wilcox* (1), and every obstruction placed on it is a nuisance, and, as laid down by Roscoe, "it is no excuse that logs are laid so that a passage is still left." And in *The King v. Russell* (2), the defendant was convicted of a nuisance in obstructing a street by keeping a wagon standing constantly before his door, (though his trade, as a carrier, rendered it necessary) and although there was a sufficient passage for carriages left open, the Court said "that the defendant could not lawfully carry on any part of his business in the public street to the annoyance of the public. That the primary object of the street was for the passage of the public, and that anything which

(1) 8 A. & El. 314.

(2) 6 East 127.

impeded that free passage was a nuisance." A verdict in such case finding the obstruction, but that it was no nuisance, would amount to a conviction. See *Regina v. Charlesworth* (1). But the public right in the use of navigable waters is not confined to the right of navigating or passing along them. That is indeed the primary right, but there are other rights, such as the right of fishery, which, though subservient, is equally well recognized in law. Now admitting the existence of a right of way on the shore when the tide is out, it must certainly be subject to the same kind of interference from other conflicting rights as it was when covered with water. Does it follow then that every erection on any part of the shore, when left dry, is a nuisance as obstructing the right of way? The right of navigation is the paramount right, and *per se* gives every one a right to sail his craft in any direction he pleases, but in as much as in the exercise of the opposing right of fishery, various contrivances, all for a time requiring possession of parts of the water, are necessary, that, to a certain extent, limits or interferes with the exercise of the paramount right. Thus, suppose the fisherman's net is spread, can a person, voluntarily, run his craft through it when there is a sufficient passage left, and when neither danger from shoals nor press of wind renders it necessary to do so? Angell (2), treating of this subject, says that where a net was run through in the Passaic River, "the decision was that the right of fishing must yield to the right of navigation where the two rights come in conflict, and that where one right only can be enjoyed that of navigation must be the one. At the same time it does not swallow up and obliterate the right of fishery, and where both rights can at the same time be enjoyed freely and fairly, that of navigation has no authority to trespass upon and incommode the other. The right of navigation, though superior, does not take away the right of fishery, but only limits it, and limits it

(1) 22 Eng. L. & Eq. 235.

(2) Sect. 558.

only so far as it interferes with its own fair, useful, and legitimate exercise. If the master of a vessel, under the pretence of exercising his right, should wantonly turn out of his regular course to run upon a net, or lie in wait till the net be spread, and then crowd sail to reach it, or if he should unnecessarily and wantonly anchor on fishing ground in these and in like cases, he is answerable in damages."

Now, what are the rights of riparian owners, with respect to seaweed. In an Irish case, *Howe v. Stowell* (1), where it was held that the public had no common law right to enter and take seaweed from the shore between high and low water mark, it was asserted by counsel, and not denied, that the public had a right to take it in boats while floating in the sea. And it is expressly laid down by Angell, 261, "that the right to take seaweed below low water mark is in the public and not exclusively in the riparian owner." But it is an ancient and well established rule of law that alluvion, or whatever may aid in the formation of land deposited gradually, or by little and little, belongs to the owner of the adjoining land, and, therefore, a stranger has no right to remove sand or other marine substances as they are from time to time washed up and deposited on the shore, or else their accumulation, which might in time form land, or raise the beach which protects it, might be prevented. And it has also been decided that artificial means may be brought to aid natural causes in producing it; see *Adams v. Frothingham* (2), cited Angell, 253. Angell, after treating of the nature of alluvion, p. 259, says "it is consistent with the explanation which has been given of the legal meaning of imperceptible increase that seaweed deposited upon the shore by natural means below the ordinary high water mark should belong to the riparian proprietor bounding opposite. And it has so been held. In *Eman v.*

(1) Alcock & Nap 349.

(2) 3 Mass. (Tyng.) 352.

Turnbull (1), in New York, the question, who had the right to seaweed, came directly before the Court, when the opinion of the Court was given by Kent, C. J., as follows:—Seaweed thrown up by the sea may be considered as one of those marine increases arising by slow degrees, and according to the rule of the Common Law, belongs to the owner of the soil. The rule is, if the increase be by small and almost imperceptible degrees it goes to the owner of the land, but if it be sudden and considerable, it belongs to the Sovereign. Seaweed is supposed to have accumulated gradually. The slow increase, and its usefulness as a manure, and as a protection to the bank, will, upon every just and equitable principle, vest the property of the weed in the owner of the land. It forms a reasonable compensation to him for the gradual encroachments of the sea to which other parts of his estate may be exposed. This is the sound reason for vesting the marine increments in the proprietor of the adjoining land. The *jus alluvionis* in this respect ought to receive a liberal interpretation in favor of private right. As the principles on which the above case was determined appear so obviously rational, and at the same time so perfectly conformable to the rules and analogies of the law, and as the question in controversy was decided by a Court of such great authority, and by one of the most eminently legal men of the age, the decision will, no doubt, be received as fully establishing the law in this country with regard to the right to seaweed.” From these authorities it appears that the riparian owner has a right, in common with the public at large, to take seaweed while floating in the sea, and that he has the exclusive right to it when deposited on the shore. Now if such be the nature of the riparian owner’s right, with respect to seaweed, may he not, like the fisherman, use such contrivances as his own skill, or the peculiar circumstances of different localities may suggest, for catching it

(1) 2 John. 313.

while floating in the sea, or securing it against being drifted away after it has become his property by being deposited on the shore. Admitting, for the present, that the public have a right of way over the shore, still, like the owner of the vessel whose right of sailing in any direction is, to a certain extent, interfered with by the fisherman's nets, so the public right of passing along the shore may, to a certain extent, be interfered with by the contrivances of the agriculturists used to catch or secure seaweed. Again, if he can lawfully use artificial means to promote or induce alluvial deposits, and if seaweed be a subject for forming such deposits, is not that decisive as to his right to erect this weir? The question in each case must be, has the right of fishery, securing seaweed, or promoting alluvial deposits, been exercised in such a manner as (not theoretically but practically) to interfere with the fair, useful and legitimate exercise of the right of navigation on the one hand, or of passing along the shore on the other. If it has it is a nuisance. If it has not, the public are not injured, and it is not a nuisance. In the words of Best, J., "the law in such cases limits and balances opposing rights that they be so enjoyed as that the exercise of the one is not injurious to the others."

Many cases where wharves were indicted for obstructing navigation were cited and commented on during the argument. In such cases the defendant has more difficulty in justifying the erection than in this. Where a wharf is erected there can be no balancing of nuisances, or rather the convenience of one class against the inconvenience sustained by another, the case of *Rex v. Russell* (1), where this doctrine seems to have been held was disapproved of by the Court of Q. B. in *Regina v. Betts* (2), and subsequently overruled in *Rex v. Ward* (3), because the public, and every class of it, have a right to an

(1) 6 B. & C. 566.

(2) 15 Q. B. 1022. 19 L. J. (3) 4 Ad. & El. 384.
Q. B. 531.

unlimited navigation of the water, and wharves, though necessary for unloading vessels, are not erections made under authority, or in the exercise of any privilege which the person making them has a right to enjoy. They are in law purprestures which, whether a nuisance or not, may at any time be abated by the Sovereign as owner of the shore or soil on which they stand (which, of course, is never done by the Sovereign unless the public good requires his intervention). But if they really do obstruct the navigation so that any class of the public are inconvenienced, they are also a nuisance, Angell 98, *Rex v. Russell* (1). Yet even then the defendant may shew that the injury to all is absorbed in the greater benefit conferred on all by the erection. But when the act complained of is done in the exercise of a legal right, as that of fishery, or collecting seaweed, the law regards the rights of both. This distinction is alluded to by Lord Denman in *Rex v. Ward* (2), he says, “but the learned counsel contend that they did not want the authority of *Rex v. Russell* (3), and could establish their right to a verdict of not guilty on the finding of the jury from a consideration of the nature of the place where the nuisance is charged. They say the river Medina, as described in the indictment, is not merely a navigable river, but a port, Cowes Harbor, and they rely on the various rights that may exist together in such a place and their unavoidable inconsistency at particular times. The same remark may, however, be true with respect to a highway where right of common and right of turbary may exist at the same time. It is still more strikingly true in respect of navigable rivers, from which it seems impossible to distinguish the case of ports in principle, though the degree may perhaps be different. When such rights happen to clash in questions brought before the Courts the valuable maxim *sic utere tuo ut alienum non*

(1) 18 Jur. 1022. S. C. 3 El. (2) 4 Ad. & El. 384.
& B. 942, (3) 6 B. & C. 566.

laedas will generally serve as a clue to the labyrinth. But the possible jarring of pre-existing rights can furnish no warrant for an innovation which seeks to create a new right to the prejudice of an old one."

Is not the real effect of the finding in this case that the defendants have exercised their own right so as not to injure the right of others?

In considering the case I have so far assumed that the public have the same general right of passage over the shore between high and low water marks with carriages when the tide is out that it has over it in boats when covered with water, and even on that assumption this finding is an acquittal.

But the truth is, that the public has not, in law, even that general right, but any right it has is one of a much more limited, or rather, of a different description. The property in the soil between high and low water marks is in the Sovereign, yet it is said to be also of common right public. But this public right appears, from Lord Hale, to be the public right of navigation for the purpose of trade and intercourse, and also the liberty of fishery. But this is a very different thing from the general right of way set up here, and which must exist before (on this finding) judgment can be given against the defendants. It may be that the public, as incident to their right of navigation and fishery, have a right of way across the shore for purposes connected with those privileges, but that right must be exercised with due regard to other equally well recognized rights. It does not follow that because a man has a right to land his fish on the shore between high and low water marks, or to draw his boat up on it, or because he has a right to collect seaweed floating on the sea or growing below low water mark, that he must also have a right to drive his wagons for fifty miles along the shore. The right of way claimed here is not confined to any particular place. If it exists at all it must, as urged by

the Attorney General, exist over every part of the sea shore, and it must, therefore, swallow up every other right which in the least degree interferes with its unlimited and capricious exercise. The same principle which would compel the Court to decide for sweeping away this erection, though found by the jury to cause no public injury, might be used to sweep away every building, wharf and erection upon the shore of all the bays and rivers of the Island. If there be this same general right of way over the space between high and low water marks when the tide is out as there is along a highway on land, how can stakes, nets, or other fishing fixtures be placed there? How can those stages of wood, or ways of stone and brush we so often see on the shore, and which are, in some situations, so necessary for unloading fishing boats in low water be maintained? To be useful they must extend below ordinary high water mark, and, therefore, must obstruct or interfere with that universal right of way which, as claimed, extends itself over every part of the shore between high and low water mark. If I sink a post in the street to tie my horse to it would be a nuisance. But would any one imagine that the man who keeps a stake in the shore to fasten his boat to is guilty of an indictable offence?

These reasons are not new, they are the same as those used by Holroyd, J., Bailey, J., and Abbott, C. J., in the elaborate judgments delivered by them in *Blundell v. Catteral* (1). In that case the right of soil in the land between high and low water marks had passed from the Crown to the plaintiff. But as the King, though he may part with the soil of the sea shore, cannot, by so doing, abridge the public rights in the sea or its shores, and as the defendants failed in establishing a prescriptive right, then circumstances made no difference further than in enabling the plaintiff to maintain trespass *quare clausum*

(1) 5 B. & Ald. 268.

fregit provided the defendants would not, against the King, have had the right of way contended for. The defendants there claimed a common law right of bathing in the sea, and, as incident thereto, a right to pass along the shore with carriages, etc. Holroyd, J., in his judgment, says, "by the Common Law all the King's subjects have, in general, a right of passage over the sea with their ships, boats, and other vessels for the purpose of navigation, commerce, etc. These rights are noticed by Lord Hale. But whatever further rights (if any) they may have in the sea, it is a different question whether they have or how far they have, independently of necessity or usage, public rights upon the shore, that is to say, between high and low water marks, when it is not sea, or covered with water, and especially when it has, from time immemorial, been or since become private property. And, after a long examination of the authorities, he says this "shews that by the Common Law the King's subjects have not a general right to use the sea shore as they please, even when the soil remains in the King, clothed with the *jus publicum*." Bayley, J., after arguing in a similar manner on the authorities, says, "the right, as claimed, is not confined to any particular place if it exists at all, but it must exist upon every part of the sea shore. Every private building then erected upon the sea shore, and even wharves and quays, would be an obstruction to that right, and, in consequence, abateable or indictable. And yet in how many instances are such buildings, wharves and quays erected? Every embankment by which land is redeemed from the sea would obstruct the exercise of this right and be a nuisance, and so would the erection of stakes for holding nets. And yet how frequently are such embankments made and stakes set up."

And Abbott, C. J., says, "there being no authority in favor of the affirmative of the question in the terms in which it is proposed it has been placed in argument at the bar on a broader ground. And as the waters of the sea

are open to the use of all persons for all lawful purposes, it has been contended as a general proposition that there must be an equally universal right of access to them for all such purposes over land like the present. If this could be established the defendant must, undoubtedly, prevail, because bathing in the sea is, generally speaking, a lawful purpose. But, in my opinion, there is no sufficient ground, either in authority or reason, to support this general proposition."

The authority of this decision has been questioned by two text writers, but it is cited with approbation by Chancellor Kent, 416, and by him considered as overruling *Bagot v. Orr* (1), and must be considered good law.

It may be asked if the public have no right of way along the shore between high and low water marks? Are they altogether debarred from using it? Certainly not. The right of property in the sea, and the soil at the bottom, and also in the land between high and low water marks, is in the Sovereign, but, though the King has the property, the people have the necessary use. But these rights of use are only the rights of piscary and navigation, and these are called public rights, and are denominated *jura publica* or *jura communia* to contradistinguish them from *jura coronæ*, or the private rights of the Crown. These public rights are said to exist of common right, which is only another epithet for Common Law. With respect to these public rights, viz., navigation and fishery, the King is, in fact, nothing more than a trustee of the public, and has no authority to obstruct, or grant to others any right to obstruct, or abridge the public in the free enjoyment of them. But subject to these public rights the King may grant the soil of the shore and all the private rights of the Crown with it. Yet, until he does so, he holds the soil clothed with the *jus publicum*, and

(1) 2 R. & P. 472.

while the soil thus remains the King's, no unnecessary or injurious restraint upon the public, in the use of the shore, would be imposed by the King, the *parens patriæ*. And he does, in fact, tacitly permit all his subjects to use the shore between high and low water marks, as, when, and how they please, so as, in doing so, one class does not attempt to monopolize it to the injury or exclusion of another. And it is by virtue of this acquiescence of the Crown that the public in general exercise the right of passing along the shore between high and low water marks during the reflux of the tide. But this permissive use, though allowing all the enjoyment and exercise of a public way which can be reasonably desired, is very different in its legal effect or operation on the rights of others from that absolute common law right of way attempted to be established here, and which is paramount to, and destructive of every right (no matter how important) which clashes with it, and which could, therefore, compel every part of the shore to be kept free from obstructions of any description.

Science and the ingenuity of man are constantly offering new inventions for the benefit of trade, manufactures, agriculture and commerce. Many of these can only become practically useful when located on the sea shore. Our newspapers are now urging the introduction of one of the most useful of these modern inventions into this Island, but if the use of the shore by the public, as a way, be not merely permissive, but of common right, by what authority could a marine railway, which must extend below low water mark, and, therefore, leave no passage, be erected or maintained? The jury would be compelled to find that it obstructed the way, and it must be adjudged a nuisance. But, further, as every man may justify the removal of a common nuisance, every individual might cut it down with impunity. But the right exercised under the permissive use justifies no such outrage, tolerates no such monopoly, but adjusts itself to suit the

peculiar circumstances of different localities, and the ever varying requirements of public convenience. As observed by Bayley, J., in *Blundell v. Catteral* (1), “the shore cannot be necessary for the exercise of this supposed right, and that it may be desirable to apply parts of the sea shore to other purposes. The King, for the public welfare, may suffer such a right to be exercised in those parts of the shore which remain in his hands, to any extent which the convenience of the public may require, but he may not, also, allow other rights to be exercised on other parts.”

One argument urged at the bar against this erection was the inconvenience and contention it might lead to, as every one might make a similar erection in front of another's land. But a little examination of the law respecting the rights of riparian owners will shew that no such inconvenience can arise. No one but the owner of the adjoining land has a right to place any erection in front of it, because his right of way, in a direct line from every foot of his bank to the water, cannot be, in any degree, abridged, and because he has other rights of a private nature connected with the water which are paramount to all others, and cannot be lawfully interfered with. Every man may build a wharf in front of his own land if it does not interfere with the navigation. But the King, though owner of the soil of the shore, cannot license a man to build in front of his neighbor.

Angell, p. 161, after shewing that lands between high and low water marks may be reclaimed by embankment, anticipates and answers this very objection. He says, “it may also be urged that if the right of embanking in and upon the sea is founded on the principle of prior occupation, it is then not confined to the owner of the upland, to the exclusion of any other person who may first commence an embankment. The answer to this

(1) 5 B. & Ald. 263.

objection is as follows: Should any individual, who has no interest in the upland, embark upon the shore between high and low water marks, he would, obviously, interfere with rights of a private nature, as he would, by such intervention, shut out the owner of the upland from the water to which the latter, as riparian proprietor, is most unquestionably entitled." And in the case of *Bowman v. Wathen* (1), cited by Angell (2), in the Circuit Court of the United States, McLean, J., in respect to the Ohio River, (which he puts upon the same footing as navigable tide waters) says, "it is enough to know that the riparian right on the Ohio River extends to the water, and that no supervening right, over any part of this space, can be exercised or maintained without the consent of the proprietor. He has the right of fishery, of ferry, and of every other right which is properly appendant to the owner of the soil, and he holds every one of these rights by as sacred a tenure as he holds the land from which they emanate. The State cannot, either directly or indirectly, divest him of any one of these rights, except by the constitutional exercise of the power to appropriate private property for public purposes, and any act of the State, short of such an appropriation, which attempts to transfer any of these rights to another without the consent of the proprietor, is inoperative and void, and can afford no justification to the grantee against an action."

We might have disposed of this case on narrower and more technical grounds, but the Attorney General, on the argument, pressed us for a decision on the points expressly raised to determine a question of much public importance. The case was argued at great length, and with great research on both sides. Every authority bearing on the question was brought forward and very ably discussed. We have, during the recess, given it the careful consideration which its importance demanded. In stating

(1) 2 McLean, C. C. 766

(2) Sect. 174,

the reasons for our decision the examination of the authorities has led us to a length which may be considered prolix, but it is difficult very briefly to explain distinctions respecting rights of this nature without leaving one's meaning open to doubt, (at least to question) which, as this decision will probably settle a question heretofore prolific of disputes, is if possible to be avoided.

The judgment must be entered for the defendants.

THE QUEEN v. JAMES GORBET AND OTHERS.

Criminal Law—Indictment quashed because agent of prosecutor on the Grand Jury.

The defendants were indicted for conspiracy to prevent C. from recovering his rents. W., agent of C., was on the Grand Jury which found the bill. A motion was made to quash the indictment because of W.'s presence on the Grand Jury, it being urged that his position was such as to prejudice him against the accused, and, therefore, to render him incompetent to be on the Grand Jury.

Held, (Peters, J.) That W. was incompetent, and that the indictment must be quashed.

MOTION to quash an indictment on the ground of incompetency of one of the Grand Jury which found the bill.

17th January, 1866.

The Attorney General shews cause.

The Solicitor General, and Longworth, Q. C., follow.

Mr. Hensley, *contra*.

Mr. McLeod, Mr. C. Palmer, and Mr. Reddin follow.

Cur. ad. vult.

18th January, 1866.

PETERS, J. This is a motion to quash an indictment found against the defendants for conspiracy, riot, and unlawful assembly. The object of the alleged conspiracy, as stated in the indictment, was to hinder and obstruct Colonel Cumberland in the recovery of his rents, and, for that purpose, to hinder and obstruct the sheriff and his officers in serving writs on his tenants. The indictment also contains counts for assault on the deputy sheriff and his bailiffs while attempting to make such services.

It appears from the affidavits that one of the Grand Jury, Mr. Charles Wright, who sat on the finding of the bill, was the agent of Colonel Cumberland for the collection of the rents and the general management of his estate,

and, as such, directed the issuing of the writs, in attempting to serve which the deputy sheriff and his bailiffs were so obstructed and assaulted. The motion is made on two grounds.

First. That Mr. Wright's position was such as would, naturally, cause him to have an undue influence, or prejudice against the accused.

Second. That as the assault and obstruction were against the deputy sheriff and bailiffs, the high sheriff must, therefore, be presumed partial, and, therefore, the whole panel is open to objection.

A finding of twenty-four impartial jurors is required by our law to convict one accused of a criminal offence. If a petit juror is of kin interested, or not indifferent, there is no doubt he may be challenged as he comes to be sworn. It is laid down, with respect to grand jurors, in Chitty's Criminal Law 309, that if a man who is disqualified be returned, he may be challenged by the prisoner before the bill is presented; or, if it be discovered after the finding, the prisoner may plead in avoidance and answer over to the felony on producing the record of outlawry attainder, or conviction on which the incompetency of the jurymen rests. This necessity for the Grand Inquest to consist of men free from all objection existed at Common Law, and was affirmed by the Statute 11, Hen. 4, cap. 9, which enacts that any indictment taken by a jury, one of whom is unqualified, shall be altogether void, and of none effect whatsoever. So if a man be outlawed upon such finding he may, on evidence that one of the jury was incompetent, procure the outlawry against him to be reversed. It is clear that a defendant before issue joined may plead the objection in avoidance, but if he take no such exception before his trial it seems doubtful how far he can afterwards take advantage of it, except it be verified by the records of the Court in which the indictment is depending, in which case any one as *amicus curiæ* may inform the Court of the objection.

But it is urged by the Attorney General and the counsel for the Crown, that though interest or relationship may be objected against a grand juror, mere circumstances which shew only ground to suspect undue influence or prejudice, and which might form ground of challenge to a petit juror, are not a sufficient objection to a grand juror's duties to enquire after all offences, and the *ex parte* nature and inconclusive effects of their decisions are urged as a reason for this distinction.

But there seems no sound reason for this distinction. If a man cannot be convicted without the voice of twenty-four jurors, is it not against all reason to say that though twelve of them must be impartial, the other twelve need not? If impartiality is required in one body, why not in the other also? Instead of a protection, the body not required to be impartial might, in many cases, only create undue suspicion against the accused. The more general nature of their duties can afford no compensation to an accused who has suffered from partiality at all, or any of those by whom he has been condemned.

The great object of the institution of the grand jury is to prevent persons being even called on to answer for alleged crimes without reasonable ground for accusation. It has been described by great jurists as the grand bulwark of civil liberty—their proceedings are conducted in secret, so that an accused or suspected person may not, without reasonable proof of guilt, suffer the mortification of a public trial. If individuals, who were actors on either side in transactions which form any material part of the subject matter of an accusation, could sit as jurors in deciding whether an accused should be subjected to a public trial or not, the principal object of the institution might, in many cases, be defeated.

But we are not without express authority on this point. In a note to Chitty's Criminal Law 309, it is said, "there exists the same right of challenging for favor the grand jury as the petit jury, Burr's trial, 38."

The authority cited, it is true, is an American decision, but the general principles of law applicable to such cases are the same in the United States as here, and that decision only follows what has been already decided in the Queen's Bench in Ireland in *The King v. Kirwan* (1). Lord Chief Justice Down says, "it would be monstrous to say that an illegal grand juror should find an indictment and that the man accused should have no mode to avoid it."

This brings us to consider whether the circumstances stated in the affidavits respecting Mr. Wright support the objection. Chitty, in his Criminal Law 543, lays it down that "the third description of challenges are those which arise *propter affectum*, or on the ground of some presumed or actual partiality in the jurymen who is made the subject of objection, for the writ requiring that the jury should be free from all exception, and of no affinity to either party, must, evidently, include both these grounds of challenging; thus, if a jurymen be under the power of either party, or in his employment, or if he is to receive part of a fine upon conviction, or if he has been chosen arbitrator, in case of a personal injury, for one of the parties, or has eaten or drunk at his expense, he may be challenged by the other; so if there are actions depending between the jurymen and one of the parties, which imply hostility, that will be good ground of principal challenge."

Could Colonel Cumberland, whose rights it was the alleged object of the conspiracy to obstruct, have been considered free from such reasonable suspicion of undue prejudice as alluded to by Chitty, and, therefore, not liable to challenge if called as a petit juror. The counsel for the Crown at first contended that he would, but on examining the indictment they, very properly, abandoned that idea, but then they contend that though Colonel Cumberland might be challenged, his agent was not,

(1) 31 State Trials 543.

necessarily, open to the same objection. But we think it impossible, under the circumstances of this case, to hold that an objection, good as to the principal, is not equally good against the agent. Mr. Wright was the agent for the collection of the very rents which it was the object of the alleged conspiracy to prevent being recovered; he, in fact, instituted the legal proceedings against the tenants from whom they were due; and though he might have no pecuniary interest in their recovery, yet he might, very reasonably, be presumed to labor under what was aptly described by Mr. McLeod as that ruffling and irritation of the mind naturally felt by one who had been engaged in conflict with those suspected of a combination against him, or who have by predetermined violence or intimidation prevented, or attempted to obstruct, the due course of proceedings which he (though on another's behalf) may have instituted against them.

The motion is, in substance, a plea that Mr. Wright was incompetent; and, as the facts, in our opinion, sustain the objection, the rule for quashing the indictment must be made absolute.

IN CHANCERY.

16th DECEMBER, 1867.

RALPH BRECKEN & WIFE V. BENJAMIN WRIGHT.

Construction of will—"Inadequacy of maintenance."

George Wright, father of the complainant, Phoebe Brecken, and of defendant, devised certain lands to his wife for life, and after her decease to defendant, and directed that these lands "should be subject and chargeable with the support of his daughter, Phoebe, (complainant) in a manner suitable to her station in life." In case of dispute as to the "inadequacy of the maintenance," the testator directed that £40 per annum should be paid to her in lieu thereof. The daughter resided with her mother and defendant until her marriage with R. Brecken in 1844, and for eighteen months afterwards, when she went to her husband's house. The mother died in December, 1851, and the defendant paid the £40 a year up to November, 1860, when he discontinued paying. The defendant contended that there was no dispute as to the adequacy of the maintenance supplied by him, and, therefore, he was not liable to pay the £40 in money.

Held, (Peters, M. R.) That the wording of the will made the daughter the sole judge as to the inadequacy of the maintenance, and she was not bound to give a reason for objecting to it, but could demand the £40 a year at any time. Also, that her marriage and removal to her husband's house was, in itself, notice that she considered the previous maintenance inadequate, and coupled with a demand for the £40 constituted a dispute respecting the adequacy of the maintenance.

2. That defendant having paid the £40 for nine years was precluded from objecting to continue the arrangement.

PETERS, M. R. In this case the plaintiffs filed their bill to compel payment of an annuity charged by the will of George Wright, the father of the complainant, Phoebe Brecken, and the defendant, on lands devised to the defendant. On the 11th December, 1841, the testator made his will devising certain freehold property to his wife, Phoebe Wright, for life, and after her decease, to the defendant, and, by a subsequent clause, directed that the lands so devised "should be subject and chargeable with the support and maintenance of his said daughter Phoebe in a manner suitable to her station in life. And in case

any dispute should arise with respect to the inadequacy or insufficiency of such maintenance, then that the sum of £30 per annum should be paid to the said plaintiff, Phœbe in lieu thereof." By a codicil, dated the 11th December, 1841, the testator directed that in case any dispute should thereafter arise touching the maintenance of his said daughter Phœbe, as mentioned in his said last will, then he directed that she should receive, annually, out of the rents of the said property referred to in his said will, the sum of £40, instead of £30 as therein mentioned. The testator died in March, 1842. The plaintiff, Phœbe Brecken, continued to reside in the homestead with her mother and the defendant up to May, 1844, when she married the plaintiff, Ralph Brecken, and she and her husband continued to reside with her mother and defendant for eighteen months after the marriage, when they removed to his house. Phœbe Wright, the mother, died on the 20th December, 1851, and from that period up to the 12th November, 1860, the defendant duly paid the annuity of £40 to the plaintiffs, when he discontinued the payment, and has since paid nothing. A large part of the answer, the evidence and the arguments are pointed to the circumstances of the testator and his family for the purpose of indicating his intention, and thereby to influence the construction of the words used in the will. But there is no latent ambiguity, or, as Lord Bacon calls it, "equivocation" here, and I can only look at the words within the four corners of the will, and must refuse to consider any extraneous facts or circumstances.

The testator in very explicit language, gives his daughter maintenance, and in case of any dispute as to its inadequacy or insufficiency, fixes it at £40 a year. The defendant contends that there is no dispute as to its adequacy or sufficiency, and, therefore, he is not liable to pay the £40 in money.

The testator evidently contemplated that a maintenance supplied in some other way than by a money payment

might, in the then circumstances of his daughter, be most convenient for all parties; but to secure her against annoyance, and the devisees against excessive expenditure on her account, he provides that in case of any dispute respecting the inadequacy of the maintenance, she is to have an annuity of £40. Now it seems to me, having regard to the testator's object, the words "any dispute respecting the inadequacy," must be construed to make her the sole judge whether the kind of maintenance provided is adequate or not, and that she was, therefore, not bound to assign any reason for objecting to it, but could, at any time, insist on payment of the £40 in money, and that the demand of that sum on her part, and a neglect or refusal to pay it by the defendant, constituted such a dispute as was contemplated by the testator.

But suppose such a dispute as is contended for was a necessary preliminary to her right to insist on payment of the £40 in money. The meaning of the word "dispute," as defined by Webster, is to argue, to reason, to discuss. The defendant, in his deposition, states "that after the death of his mother, Phœbe Wright, he, on being strongly urged so to do by the complainant, Ralph Brecken, and because the defendant did not wish that any disturbance should arise between parties so nearly connected, paid the money." Now, it is impossible to read this admission without coming to the conclusion that there must have been reasoning, arguing, or discussion respecting the demand for a money payment of the annuity, and that of a character to convince the defendant that a refusal to comply with the demand would be followed by an attempt to enforce it, or he would not have feared that a non-compliance would create disturbance between them. There was, therefore, a "dispute." The meaning of the word "inadequacy" is "the quality of being insufficient for a purpose." The purpose to which the word here refers is the maintenance of this lady in a manner suitable to her station in life, Now, though board and lodging

provided for a young lady in her mother's house might be very convenient and suitable to her station in life, and, therefore, a very adequate maintenance for her while single, it would be a very inadequate maintenance for her when she became a married woman, because that mode of providing it would not be convenient for her, and not suitable to her then station in life, and, therefore, I think the fact of the marriage and removal to her husband's house is sufficient evidence, and was notice to the defendant that the maintenance, as previously furnished, was not, and had ceased to be considered adequate for her in her then station of life, and coupled with the demand for payment in money and neglect or refusal of the defendant to pay, clearly constituted (in the words of the will) a dispute respecting the inadequacy of the maintenance.

If any evidence were wanting, the defendant's letter to the plaintiffs' solicitor, of the 2nd June, 1864, supplies it.

June 2, 1864.

GENTLEMEN,

I received your note of the 28th of May, requesting payment of £140.

I have not been able to understand what right Mr. Brecken has to demand £40 a year of me in cash. If he cannot support his wife I am agreeable to do so from this second day of June, 1864. He can let me know once a month, or oftener, what he requires, and I will furnish everything requisite necessary for her support.

If he wanted the annuity paid (about which he harassed the last years of my mother's life, and gave her to understand that if she wanted law she should have it) he should have demanded it in items that he required for the support of my sister, etc.

BENJ. WRIGHT.

After paying nothing for four years he expresses his surprise that money is demanded, but promises, if the plaintiff, Ralph Brecken, is not able to support his wife, he will furnish such things as plaintiff may demand, monthly, for the future. Now, if an argument could be

raised as to a dispute about adequacy, surely the paying nothing for four years, and denial of legal liability to pay anything for the future, would be an answer to it, as nothing at all would be an inadequate maintenance indeed.

It is unnecessary to consider whether the paying for nine years in money is an acquiescence which would now preclude the defendant from objecting to that arrangement. But I think that the defendant being clearly chargeable with the maintenance, and having, on his sister's marriage, and at her request, substituted a money payment in lieu of that previously adopted, could not, after acting for nine years on the new arrangement, repudiate it and go back to the first without his sister's consent merely because some formal dispute had not taken place before the last arrangement was adopted, his right to insist on such a formal dispute (if it had existed) would be waived by his subsequent conduct.

In every way in which this case can be looked at I find the defendant is wrong, and the plaintiffs are entitled to the relief prayed.

Let it be referred to Master Longworth to take an account of what is due to the complainants for the arrears of the annuity of £40 annually given to the plaintiff, Phoebe Brecken, by the will and codicil thereto of her father, George Wright, in the bill of complaint in this cause mentioned, and which have accrued due since the 12th day of November, 1860, and to tax the plaintiffs their costs of this suit. And it is ordered that the amount found to be due from the defendant for such arrears, together with the costs to be taxed, be paid by the defendant to the plaintiffs. And that any of the parties shall be at liberty to apply to this Court as occasion may require.

JOHN LEFURGY v. PETER MCGREGOR & MICHAEL
MCNEILL.

*Contract—Breach—Bond for performance—Liquidated damages
—What breaches covered by bond.*

Defendants contracted to build and complete a vessel for plaintiff by 1st of August, and agreed to pay £4 10s. for each day the vessel was detained beyond that date. At the same time they executed a bond and warrant of attorney authorizing plaintiff to enter judgment against them for £700, conditioned to be void if the vessel was completed in time. The vessel was delayed one hundred and five days, which, at £4 10s. a day, would give £472 10s. Including this £472 10s. the accounts showed £738 to be due plaintiff, and he entered judgment and issued execution for £700. Defendant moved to set aside the judgment and execution on the grounds that £4 10s. a day was a penalty and not liquidated damages, and secondly that in any case the condition of the bond did not apply to damages beyond, or to breaches not covered by the £4 10s. a day.

Held, (Peters, J.) That the £4 10s. a day were liquidated damages.

2. That the condition only applied to the non-delivery of the vessel and not to other damages and breaches, and the levy must be reduced.

MOTION to set aside judgment and execution thereon.

3rd February, 1868.

Hensley, Q. C., shews cause.

Longworth, Q. C., and Brecken, Q. C., follow.

Palmer, Q. C., *contra*.

Mr. C. Palmer follows.

Cur. ad. vult.

5th February, 1868.

PETERS, J. The defendants agreed to build a vessel for plaintiff. The agreement contained the following clause: "The said vessel to be finished, launched, and completed on or before the first day of August next. The said defendants, hereby, agreeing to pay the plaintiff £4 10s. per day for each and every day the said vessel

shall be detained after the said first day of August, by reason of the non-completion of the said agreement."

The defendants, at the time, executed a bond and Warrant of Attorney authorizing judgment to be entered against them at the suit of the plaintiff for £700. The condition of the bond was as follows, "that if the said Peter McGregor and Michael McNeill deliver afloat on Grand River a vessel of about one hundred and ninety-two tons register, to be finished on or about the first day of August next, according to an agreement bearing even date with these presents, then this obligation to be void."

The vessel was not delivered for one hundred and five days after the first of August, which, at £4 10s per day, would amount to £472 10s.

An account between the plaintiff and defendants was made up shewing a balance of £738 due the plaintiff, and this account was acknowledged and signed by defendant McNeill. The £472 10s. for detention formed part of this balance.

The plaintiff entered judgment and sued out execution for £700.

A rule nisi was obtained to shew cause why the judgment and execution should not be set aside.

It was urged by defendants' counsel that the £4 10s. per day is not liquidated damages, but in the nature of a penalty. And, secondly, that at all events the condition of the bond does not apply to any damages beyond or in respect of breaches not covered by the stipulated amount.

It is unnecessary to advert to the arguments and numerous authorities cited to shew that the £4 10s. per day is in the nature of liquidated damages.

The general rule established by the authorities seems to be that when an agreement contains several stipulations, some of them relating to matters of great importance to the parties, and others of little or no importance, a covenant for liquidated damages, generally upon any violation of the agreement, shall not be carried into effect

however strong the language may be. But if the agreement contains only a single stipulation, or the covenant for liquidated damages be confined to any specific breach or breaches where the agreement contains more than one stipulation, such covenant is valid and may be enforced. Though the application of the rule may, in some cases, be difficult, in the present case it is clear that the agreement to pay £4 10s. per day relates to the time stipulated for the delivery of the vessel, and was intended as a conventional arrangement between the parties fixing a definite sum as compensation for damages (in their nature uncertain) which the plaintiff might sustain if the appointed time of delivery was postponed. But the language of the condition of the bond only points to the particular stipulation for delivery at the time agreed upon, and had the delivery been made at that time, the condition would have been performed and the bond would, thereby, have become void. Therefore any damages sustained by the plaintiff in respect of breaches of other stipulations in the agreement, or for advances made to the defendants, though they might be recoverable in an action, could not be covered by the judgment entered on the bond.

The levy must, therefore, be reduced, but must stand for £472 10s. and costs of the judgment, execution, etc., and of the costs of this rule, to be taxed and added to the levy. And on payment in satisfaction of the said sum of £472 10s., with costs of the judgment, execution and incidental expenses, and the costs of this rule to be taxed, the judgment must be marked satisfied.

JOHN HASZARD V. THE CHARLOTTETOWN MUTUAL
INSURANCE CO.

*Pleading—Duplicity—General allegation of fraud—Amendment
allowed after demurrer argued.*

Plaintiff claimed under a policy of insurance against loss by fire. and the declaration averred that immediately after the fire he sent in as particular an account of his loss as possible. The defendants pleaded *non actio*, because plaintiff did not send in as particular an account of the loss as alleged, and in the same plea added “nevertheless for a plea in this behalf,” alleging fraud in general terms. To this there was a special demurrer on the grounds of duplicity, and that the allegations of fraud were too general.

Held, (Peters. J.) No duplicity, the real plea being fraud, and that the traverse at the beginning of the plea was an introductory part, which was waived as a defence.

2. The charge of fraud was sufficiently specific, as the alleged fraud was within the knowledge of the opposite party.
3. That plaintiff should be allowed to withdraw his demurrer and reply.

SPECIAL DEMURRER.

5th February, 1868.

Mr. Hodgson in support.

Mr. C. Palmer, *contra*.

Haviland, Q. C., follows.

Longworth, Q. C., replies.

Palmer, Q. C., follows.

Cur. ad. vult.

10th February, 1868.

PETERS, J. The declaration in this case averred that the plaintiff, immediately after the fire, did send in as particular an account of the loss as possible. The fourth plea was as follows:—

“And the defendants for a further plea, etc., *actio non* because they say that the said plaintiff did not, as soon as possible after the said loss and damage in the said first and second counts mentioned, send in as particular an account

of the said loss and damage as the nature of the case admitted of in manner and form as the said plaintiff hath above in these counts alleged. Nevertheless for plea in this behalf the said defendants say that in the claim made for the said loss and damage in the said first and second counts mentioned and set forth, there appeared to be fraud within the true intent and meaning of the said ninth condition referred to and annexed to the said policy, that is to say, fraud in taking and estimating the quantity, nature and value of the goods, etc., in the counts, supposed to have been burnt, etc., contrary to the said ninth condition, etc., verification."

The fifth plea, which is also demurred to, is clearly bad and there must be judgment on it for the plaintiff.

To the fourth plea there was a special demurrer, on the ground of duplicity, and that the allegations of fraud are too general.

The plaintiff's counsel urge that the sending of the account is traversed in the first part of the plea, and that the not sending such account, or the fraud alleged in it, is, either of them, an answer to the action, and, therefore, the plea is double. And, undoubtedly, if the plea professes to rest on both as a defence, that would be the case. But does not the plea in substance amount to merely this: You, the plaintiff, did not as soon as possible send in the particular account of loss as you have alleged, but, notwithstanding, *i. e.* waiving or not insisting on that, I say that in the claim you did make for the loss there appeared to be fraud within the meaning of the ninth condition. If this be the real meaning of the plea, and I think it is, there is no duplicity, as fraud alone is insisted on as a defence. "Nevertheless for plea in this behalf" is an elliptical expression, the antecedent denial showing that the words waiving or not insisting on that are omitted. But besides this the law is clear that underwriters lose their right to insist on preliminary proofs by objecting to

the loss on other grounds. "Thus where a policy required, as a preliminary proof, a statement as to assured's ownership of the building, and its being free from encumbrance, the right of the underwriters to insist upon such a statement was held to be waived by their objecting to the loss on other grounds." *Underhill v. Agawam Mutual Fire Insurance Co.* (1), cited in Phillips Ins. 564. Therefore when this plea denies that a proper account was sent in, in proper time, and yet the defendants objected to it when sent in on other grounds, viz., fraud, it shews that the defendants' right to object to the account either for delay in sending it in, or for want of sufficient particularity, is not only not insisted on, but actually does not exist. That right (if it ever existed) being in law extinguished by the facts stated in the plea, no plea could be freer from the objection of duplicity. In the numerous cases cited on the argument, the question was not whether the several denials or allegations professed to be or were put forward as a defence, but whether looking at them as used with that intention they really constituted two defences.

Exactly the same form of plea is given in the fifth edition of Chitty on Pleading, Vol. 3, p. 2016, and is inserted in the sixth edition of the same work, published in 1857, without alteration, and Chitty, junior, in his precedents, gives a form in *assumpsit*, omitting the introductory part here objected to, but for a plea in covenant refers to the form in Chitty on Pleading above cited. But it seems to me either form would be good. The pleader here seems to have fallen into error from looking at the averments separately without considering the legal effect of the whole plea.

As to the other objection, that the charge of fraud is not sufficiently specific, it seemed to me at first that the plea might be open to this objection. But the authorities

(1) 6 Cushing (60 Mass.) 440.

are clear that where the alleged fraud lies within the knowledge of the opposite party such general plea is sufficient.

As by judgment for the defendants on this demurrer the plaintiff would, from a simple error on a mere formal point of special pleading, lose a very large sum of money to which the trial and verdict have shewn us he is entitled, we think we are bound to exercise our discretion and permit him to withdraw his demurrer and reply. But as an issue will then arise to be disposed of by a jury, the verdict must be set aside and a new trial had on all the issues. The plaintiff to have leave to withdraw his demurrer and reply. The verdict now standing to be set aside and a new trial granted, the costs of the former trial to be costs in the cause.

IN RE GEORGE MCKAY.

Insolvent Relief.

February, 1868.

PETERS, J. An assignment to a creditor by an insolvent person after service of process under pressure does not deprive a prisoner of right to weekly allowance under Insolvent Act.

See *Arnell v. Bean* (1), *Morgan v. Horseman* (2), *Doe dem Boydell v. Gillett* (3), *Mogg v. Baker* (4).

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| (1) 8 Bing. 87; S. C. 1, M. & Sc. 151. | (3) 2 C. M. & R. 579. |
| (2) 3 Taunt. 241. | (4) 4 M. & W. 348. |

IN CHAMBERS.

THE UNION BANK V. THOMAS DAWSON.

Commission to examine witness abroad refused, when unnecessary delay in making application.

Defendant was father of W. B. Dawson, who absconded, having assigned his property to defendant as trustee, who claimed to be a creditor for a large sum. The trial had already been postponed one term, and now defendant applied for a commission to examine his son abroad, alleging that he had not done so before because he did not know where his son was, but this was not positively stated, but left to be inferred argumentatively from the affidavits. He and his attorney admitted having been all along in communication with the son, but through a third person. To grant the commission would cause the trial to be put off for another term.

Held. (Peters, J.) That there was no valid reason for the delay, and that the rule must be refused.

APPLICATION for commission to examine witness abroad.

6th June, 1868.

PETERS, J. This is an application for a commission to examine a witness, W. B. Dawson, abroad. From the plaintiff's affidavits it appears that defendant, Thomas Dawson, is the father of W. B. Dawson. That defendant was connected with his son in business, and that in October last the son absconded (having committed forgeries) making an assignment of his property to the defendant and others as trustees. That defendant accepted the trust and claims to be a creditor of his son's to a large amount.

In Hilary Term last the trial was postponed on the affidavit of the defendant stating that one George Nicoll, resident in California, was a necessary witness. The defendant now makes application for a commission to examine his son, W. B. Dawson, alleging that his (defendant's) name, as indorser of the notes discounted by his son, is forged, and that the commission will be of no use unless the trial is put off. The defendant alleges as an excuse for not making the application earlier, that

he did not know where his son was to be found. The affidavit of the defendant and his attorney is, in some respects, very circumstantial as to the steps taken to discover his son's residence, but neither of them distinctly swears that they did not know where he could be found, but leave that to be inferred argumentatively from the narration of their alleged endeavors to find him out.

The defendant and his attorney both admit that they have been all along in communication with the son, but that the letters from the son, and theirs to him, passed through the medium of a third person, but neither the name or address of such third party has been given. Indeed there appears in the affidavit to be a studied concealment of facts which I should in such a case expect to be fully stated.

After hearing the argument of counsel, and carefully reading the affidavits, I cannot believe that the defendant was unaware of where his son was, or, at all events, that he could not have found it out if he really desired to do so. Now that he is aware of it he declines to disclose it, but says he has arranged with his son to come to Calais, in the United States, to be examined. Now, considering that it is a case between father and son, who has absconded assigning all his property to the former, and that constant communication by letters had been kept up between them, I think that he might easily have arranged with his son to come to Calais and be examined last winter or this spring, so as to have his evidence in time for the trial, instead of deferring the application for a commission until now, when, if granted, the trial must be again put off until January, 1869.

The summons must be discharged with costs.

E. J. HODGSON V. THOMAS DAWSON.

6th JUNE, 1868.

A Judge at Chambers has no power to order *viva voce* examination of a witness *de bene esse*.

PETERS, J. In this case the application is for a commission to examine W. B. Dawson, the defendant's son.

It appears that issue was only joined five days ago. The delay in joining issue may, for aught that appears, have arisen as much from the plaintiff as the defendant.

The defendant could not move for a commission till the cause was at issue, and has, therefore, been guilty of no delay. The order for a commission must, therefore, be absolute. But I decline ordering the examination to be *viva voce*, as I think I have no power to do so. Nor do I see that the case is one that requires a departure from the ordinary course.

EDWARD J. HODGSON v. THOMAS DAWSON.

Judge interested in another action against defendant, on similar facts, disqualified to try cause—Query.

Objection was taken to the judge trying this cause, on the ground that he was a shareholder in the Bank of P. E. I., which had a case against the same defendant, in which the same questions would arise and the same evidence be given as in this case, and, as such shareholder, was interested in the result of the present action, and, therefore, disqualified to try it.

Peters, J., was of opinion that the objection did not disqualify him, but the Chief Justice being of a contrary opinion, he declined to try the case.

OBJECTION to judge trying cause on the ground of interest.

Mr. McLeod, for plaintiff, shews cause.

Mr. Charles Palmer follows.

Thompson, Q. C., (New Brunswick Bar) *contra*.

Mr. Alley and Mr. Davies follow.

6th July, 1868.

PETERS, J. On Saturday the Attorney General intimated to me that an objection would be made to my trying this case, and I requested counsel to make the objection at once, so that I might have an opportunity of looking into authorities, and considering the objection before the cause was called on.

It appears that besides this case there are several other cases against the defendant by different parties, and amongst them one by the Bank of Prince Edward Island, (but which does not stand for trial this term) in which I am a shareholder to the extent of six hundred pounds. It is alleged that the questions which will arise and the evidence which will be given in this case are similar to those which will arise in the case of the Bank of Prince Edward Island, and, therefore, I am incapacitated to try this case. I can have no interest (by which I mean valuable or pecuniary interest) in the results of this case,

as the claims of the Bank of Prince Edward Island are not involved in it, and a verdict or judgment in this case can in no way affect its interests. A similar objection was taken by the defendant to certain jurors whose names had been returned by the sheriff as special jurors, some of whom were shareholders, others directors, and one the book-keeper of the Bank of Prince Edward Island. The application being, as I conceived, premature, I did not decide the point, but it appeared to me that officers and directors of the two banks (with which the defendant's son, who has absconded, had, as I understand it, large discount transactions, on which, or on some of which, it is sought by these suits to make old Mr. Dawson, the defendant, liable) would likely become so conversant with at least one side of the facts, perhaps, in some degree common to all the suits, that their minds might be prejudiced, and as there could be no difficulty (if their names were struck off) in supplying their places with unobjectionable persons, I suggested to the plaintiff's counsel that they should consent to the sheriff's amending his list in this respect, intimating that, if on looking into the authorities, I felt myself authorized to do so, I should, on their being challenged, reject them. My suggestion was acceded to.

Now the objection to my trying this case is the same as that urged against jurors who were mere shareholders, viz., not that I am interested in the result of this suit, but that from similarity of the circumstances between the case in hand and that pending between the Bank of Prince Edward Island and the defendant, there will exist some bias or feeling in my mind which may influence my judgment against the defendant in this suit.

The general rule is that a juror shall be indifferent, and if it appear probable that he is not so this may be made the subject of challenge, as there is generally no difficulty in supplying the place of a juror so objected to by one who is unobjectionable, there can be no injury done in

rejecting him. But the place of a judge may not be so easily supplied, and his refusing to act in a particular case may be productive of great wrong and injury to suitors, and, therefore, I think that even assuming the objection to mere stockholders as jurors a good one, it would furnish no test of the validity of such an objection to a judge. On a challenge to a juror for favor, his fellow jurors may try whether he is indifferent, if they pronounce him so he is competent. But who is to try whether a judge is so? It must be decided by himself, and when he knows that he has no feeling whatever is he to declare that he has?

And here, I must observe, that in any case it is easy to say that in the opinion of a party the facts and questions in different cases will be similar, but it is difficult to see by what process of investigation the judge is to satisfy himself that they will be so. Here one side say that, in their opinion, the facts are the same, and that the questions will be the same; the other side say that, in their opinion, they will be materially different. The judge must, therefore, adopt and act on the opinions of one side, or investigate the facts of each different case before deciding whether he will proceed with the trial. Besides, by what means can a person, a stranger to a suit about to be tried, be compelled to inform either of the parties to it what his evidence, or case, in a suit pending between him and either of them will be?

And unless the judge knows what it will be, how can he compare it with the evidence intended to be given, or the questions to arise in the case about to be tried? The truth of the objection, that the facts and questions are the same, as well as the answer to it, must, therefore, in many cases, rest chiefly on opinion, the correctness of which cannot be satisfactorily tested, a strong argument in my mind against the validity of such an objection in any case. Objections to a judge for interest in the result of the suit are not surrounded with any such difficulties.

But let us see what the authorities say on the subject. I have taken some pains to examine all the old and modern cases which I could find in my library. It is not necessary to review them, but I will refer to some which bear closely on the case in hand. The leading case is that of *Dimes v. The Grand Junction Canal Company* (1). It was an appeal to the House of Lords from the Lord Chancellor of England. It appeared that a suit, in which the company were plaintiffs, was heard by the Lord Chancellor, who was a shareholder in the company to the extent of two thousand pounds. The appeal was heard by Lord St. Leonard, Lord Brougham, Lord Campbell, and eleven of the judges of England. It was decided that such part of the Lord Chancellor's order as could only be made by the Lord Chancellor was valid, notwithstanding his being interested, but that those orders which might have been made by another judge were voidable. Parke, B., who delivered the opinion of the eleven judges, in alluding to the disqualifying interests of the Lord Chancellor, says, "we think that the order of the Lord Chancellor is not void, but we are of opinion that as he had such an interest as would have disqualified a witness under the old law he was disqualified as a judge." Then he puts the competency of the judge as a witness under the old law as a test of his being disqualified as a judge. What was such an interest as excluded a witness under the old law is thus laid down in Roscoe's Evidence, 85 :—"The general rule is that no objection can be made to the competency of a witness unless he is directly interested in the event of the suit, or can avail himself of the verdict in the cause so as to give it in evidence on any future occasion in support of his own interest." Suppose I was called as a witness in this case, would my being a shareholder in the Bank of Prince Edward Island have been a valid objection to my competency as a witness under the old law? Certainly not,

(1) 17 Jur. 73; S. C., 3 H. L. Cas. 794.

because I could neither gain nor lose by the verdict, or avail myself of it on any future occasion to support my own interests. If this be, as laid down by the eleven judges of England, a correct test, it is decisive of the present question. In *ex parte Medwin v. Hurst* (1), Lord Campbell, in pronouncing judgment, says, "the law is wisely jealous on this head, and the slightest real interest in the issue of a suit incapacitates any one from acting as a judge in it, although it may be certain that, in fact, the interest from its real or proportionate insignificance cannot create any bias in his mind, but then, he adds, it must be a real interest."

In every case I have met with where a judge, justice of the peace, or person exercising judicial functions, was held disqualified, he had an interest in the result of the suit, and I can find no case where such an objection as this has been made.

In the *Parishes of Great Charte and Kennington* (2), I find it laid down that where there are no other justices but those who are interested, they (though interested) may be allowed to act to prevent a failure of justice. And in a case in the Year Book 8 Henry VI.—19, it was held that it was no objection to the jurisdiction of the Court of Common Pleas, that an action was brought against all the judges of the Court of Common Pleas which could only be brought in that Court. Mr. Thompson mentioned two cases which occurred in New Brunswick. In one, trustees for creditors were sued by a third party, and a bank (in which Judge Wilmot's brother-in-law was a shareholder) was a creditor, the verdict was set aside, and no doubt correctly, for the judge's brother-in-law, though not nominally, (as a shareholder) was, in reality, a defendant in the suit, and, therefore, the judge could not try it from his affinity to the party; and another, in which the late Chief Justice Parker refused to try an action about a boundary line, because the prolongation of

(1) 17 Jur. 1178.

(2) Strange 1173.

the same line would also form the boundary of his land situate at a considerable distance. But if as it seems to me, the verdict in the case could not bind his right, with the highest respect for the opinion of that eminent and very learned judge, I think on that occasion he was in error.

The authorities, and the best consideration I can give them, lead me to the conclusion that the objections urged are not such as to disqualify a judge, but, notwithstanding, if there were any other judge, by whom the case could be tried, I should have gladly left it to him. But the Chief Justice and myself being the only judges, he being the plaintiff's uncle, cannot try it, and my declining would prevent the case being tried at all, at least during the present term, I should, therefore, have felt myself bound to proceed with the trial, but having consulted the Chief Justice on this question, and finding that he differs from me in opinion, I must decline to do so.

McPHERSON v. RAMSAY.

Description of land—Falsa demonstratio.

The land was described as commencing at a stake on the O'Leary Road, about thirty chains from M.'s north-east angle, when in fact the nearest point of the locus was not within ninety chains of M.'s north-east angle. The question was (1) whether the words "from M.'s north-east angle" could be rejected as a *falsa demonstratio*. (2) Could the location of the land be shifted from the locality described in a deed executed by the sheriff under the Land Assessment Act.

Held, (Peters, J.) in the negative on both points.

APPLICATION for rule nisi for new trial, etc.

25th January, 1869.

PETERS, J. The deed describes the boundary of the premises as "commencing at a stake on the O'Leary Road about the distance of thirty chains from Moreside's north-east angle of land." The evidence shewed that the *locus in quo* was not (at the nearest point) within ninety chains of Moreside's north-east angle. The question is, can the words "from Moreside's north-east angle" be rejected as a *falsa demonstratio*. Secondly, can the site of land be entirely shifted from the locality described in a deed executed by the sheriff under the authority of the Land Assessment Act. The following authorities seem to me very conclusive on the point: 1 *Greenleaf* (1),^a *Doe dem Hubbard v. Hubbard* (2), there must be a good and certain description left, after shutting out the *falsa demonstratio*. In *Goodtitle v. Southern* (3), the question was as to parcel or no parcel, the site was not moved, and the description was complete, after rejecting the words which were inconsistent with the general description.

In *Doe dem Preedy v. Holton* (4). the Court held that, by the true construction of all the words of the description, the cottages passed, and that evidence to shew that the testator did not intend they should was

(1) Ev. Sect. 301.

(2) 14 Jur. 1110.

(3) 1 M. & S. 299.

(4) 4 Ad. & El. 76.

inadmissible. In *Doe dem Norton v. Webster* (1), evidence to shew that the ground had been occupied with the house conveyed, and, therefore, in law passed under the word “appurtenances,” was admitted. But the conditions of sale, and the declarations of the grantee, were held inadmissible to shew that it was excepted, because that would contradict the deed. In 1 Greenleaf Ev. it is laid down, “evidence necessary to ascertain the premises must be retained, but words not necessary may be rejected, if inconsistent with others.”

In *Smith v. Galloway* (2), had the words been, “all that part now in the occupation of Smellbones, and lying on the north-west side of the line,” the occupation would have been a material part of the description, and the occupation could not have been rejected as a *falsa demonstratio*, per Parke, B.

In this case the point of commencement mentioned in the description is a stake, thirty chains from Moreside’s north-east angle of land. Is not that angle then a material part of the description? Reject it and where are you to find a point of commencement for your lines? *Miller v. Travis* (3). In *Hutchins v. Scott* (4), the point decided was, that an altered agreement might be given in evidence in an action for excessive distress to shew the terms of the holding. It is true, Lord Abinger says, “if 35 was the house intended, I am clearly of opinion parol evidence was admissible to shew that 38 was a mistake.” But this is a mere *obiter dictum*, not necessary to decide the case in hand, and it must be remembered that the defendant had only one house in Broad street, and, therefore, the description, “his house in Broad street (No. 38) after 38 was struck out, would describe the only house he had in the street with certainty. And Lord Abinger adds, “if there were any suggestion

(1) 12 Ad. & El. 442.

(2) 5 B. & Ad. 43.

(3) 8 Bing. 244.

(4) 2 M. & W. 809 at 814

. that the defendant had any other house the case might be .
different."

This is a land tax deed where the sheriff selects any land on which the tax is not paid, or any part of a tract where an owner of a large tract has left the tax on any part thereof unpaid. And it is, therefore, the same as if made by a man who had a dozen houses in one street. See also *Gascoine v. Barker* (1), *Pedley v. Dodds* (2). Although the case seems very clear it is a very important one. And if, after examining the authorities to which I have referred, the counsel thinks there is any ground for the rule he can take it. But I entertain no doubt on the question.

At a subsequent day Mr. Palmer declined to take the rule.

(1) 3 Aitk. 8.

(2) L. R. 2 Eq. 819.

THE QUEEN V. GEORGE DOWEY.

Murder—Motion for new trial, etc.—Grand juror, foreman of coroner's jury which returned verdict of murder against prisoner.

The prisoner had been found guilty of murder. His counsel moved for a new trial, or to arrest judgment, on the ground that W., one of the grand jury, which found the bill against him, had previously acted as foreman of the coroner's jury, which had returned a verdict of murder against the prisoner. The same objection had been taken before the jury were sworn.

Held, (Peters, J.) That as the objection did not affect the justice of the proceeding the application must be refused.

MOTION for new trial or in arrest of judgment.

23rd January, 1869.

Mr. McLeod in support.

Mr. Brecken and Mr. C. Palmer follow.

The Attorney General, *contra*.

Palmer, Q. C., follows.

Mr. Charles Palmer replies.

Cur. ad. vult.

25th January, 1869.

PETERS, J. On Saturday the prisoner's counsel moved for a new trial, or to arrest the judgment, on the same ground taken before the jury were sworn, viz., that Mr. Weeks, one of the grand jury who found the bill, had previously acted as foreman of the coroner's jury which returned a verdict of murder against the prisoner. The prisoner had pleaded to the indictment some time before the first objection. But it was asserted and admitted by the Attorney General that the prisoner was not aware of the fact until after he had pleaded.

It is urged that Weeks having, by his verdict, expressed his opinion of the truth of the charge against the prisoner became incapacitated from afterwards acting as a grand juror on the indictment founded on the same charge. It is urged that he stands in the same position as a petit

juror who, having given a verdict on one trial, is challengeable if called as a juror on a second trial of the same cause, and of a grand juror who is incapacitated from serving as a petit juror on the trial of an indictment found by the jury of which he was a member.

It is unnecessary to refer to the numerous authorities cited to prove that a petit juror may be challenged for such causes, there being no doubt that he may. But the duties pertaining to the grand and petit jury are materially different. The latter hears both sides, tries, and finally decides on the guilt or innocence of the accused. The former only inquires whether the circumstances raise such a probability of the charge being true as ought to place the accused on his trial.

The coroner's inquisition was, in effect, an indictment against the prisoner on which he could have been arraigned, tried, and convicted, without any other indictment being found. But for fear of its not being so correct in form as to sustain a conviction, the same charge, under the name of an indictment, is preferred before the grand jury. It is every day's practice, where an indictment is supposed to be defective to send up a fresh one to the same grand jury. Now then, the grand jury have previously found against the accused on the same charge, yet no one ever heard of an indictment being quashed on that ground. That is substantially what Weeks did here, and I can see no reason why, if the grand jury had been composed of the identical persons who composed the coroner's jury, they might not have found a fresh indictment.

The finding of the coroner's jury is not, in its legal effect, a positive assertion that the prisoner is guilty of murder, but only that the evidence renders it so probable that he ought to be charged with it. In contemplation of law he is still innocent. But when a petit jury has found a verdict of guilty it is a positive assertion that the party

is so, and, therefore, he cannot act on a second trial of the same cause.

One reason for the grand jury being liable to challenge is that he may be one of the twelve who found the indictment, and then if he sat on the trial a criminal would be convicted by only twenty-three instead of twenty-four of his peers. And the other reason is, that the Statute of 25, Edw. 3, enacts that no indictor shall be put on the inquest of the inditee if he be challenged. These, I am convinced, (after a careful examination of the authorities) are the reasons why a grand or petit juror, in the cases respectively put, is liable to challenge on a trial, and if so it shews, I think, most conclusively that the authorities cited relate to a different state of things, and, therefore, do not in any way support the present objection.

The paramount necessity for preserving the purity of the streams of justice in every body concerned in its administration, whether his functions be proemial or decisive, will, of course, lead to the rejection from either body of any one interested in promoting an accusation.

But supposing such an objection as the present lies to a grand juror, it can only be on the ground of his having expressed an opinion, and taken as a challenge to the favor to be determined by triers. It is laid down if a disqualified person be returned on the grand jury he may be challenged by the prisoner before the bill is presented, or if it be discovered after the finding the defendant may plead in avoidance and answer over to the felony, 1 Ch. C. L. 309. *Sir William Withpole's case* (1). But in the cases referred to the challenge was to the principal. It seems doubtful whether challenge to the favor can be so pleaded, or indeed made at all to a grand juror, (though the American decisions are that it may) but assuming that it could, the prisoner here did not plead it, but pleaded not guilty only. Neither did he challenge

(1) Cro. C 134.

before the indictment was found, but he moved to quash the indictment which, in strict law, he cannot do after plea pleaded (1), yet, in furtherance of substantial justice, the Court will sustain an objection, though in strict law a prisoner may be too late in making it. But where the objection is merely technical, where the prisoner cannot be injured by the irregularity of which he complains, and it is, evidently, made merely in delay of justice, the Court will not use its power to assist him. *Sir William Withpole's case* (2), which was an indictment for murder, is a strong illustration of this principle. And the decision of Lord Denman in *Rex v. Sullivan* (3). proceeded on the same ground. No one can suppose that Weeks' being on the grand jury was in the least degree prejudicial to the prisoner in this case.

But if the law had been otherwise, the Island Act 24 Vic. cap. 10, sec. 34, is conclusive. It enacts that every objection to any grand jury panel, or individual grand juror, or challenge to the array, shall be made before pleading to the indictment, and not afterwards, unless it shall be made out to the satisfaction of the Court that the party was not aware of it at the time of pleading, in which case, if the Court shall consider that such objection was material, and really and substantially affected the impartiality and justice of the proceeding, then, and in that case, but not otherwise, the Court, if it thinks fit, is thereby authorized to grant a new trial. As this objection did not affect the justice of the proceeding the application must be refused.

SENTENCE :—

That you, George Dowey, be taken from hence to the jail from which you came; and from thence you must be taken to Pownal Square, in Charlottetown, on Tuesday, the 30th day of March next, between the hours of six o'clock in the morning and six o'clock in the afternoon, where you are to be hanged by the neck until you are dead, and may God Almighty have mercy on your soul.

(1) 1 Leach, C. C. 11. (2) Cro. 134. (3) 8 A. & El. 831.

SIMON BOUCHE V. JOHN AYLWARD.

Merchant Seaman Act—Jurisdiction of two justices respecting wages up to £50—Enquiry into accounts exceeding £50 to ascertain balance.

The Merchant Seamen Act gives two justices of the peace jurisdiction in actions for wages up to £50. Plaintiff sued for a balance of £15. 15. To ascertain the balance really due the justices had to enquire into the amount of his wages during his whole service, which exceeded £70. An application was now made to set aside their judgment on the ground that they had exceeded their jurisdiction.

Held. (Peters, J.) That the judgment below must be sustained.

MOTION to set aside judgment recovered before two justices of the peace.

26th January, 1869.

Mr. Davies shews cause.

Mr. McLeod, *contra*; Mr. C. Palmer follows.

Mr. Alley replies.

Cur. ad. vult.

3rd February, 1869.

PETERS, J. The judgment below must be sustained, The action is brought under the Merchant Seamen Act, 28 Vic., cap. 18, sec. 22, which permits seamen to sue before two justices for any amount of wages due to such seamen not exceeding £50. The plaintiff sued for £15 15s. balance of wages, and in order to ascertain what balance was due it was essentially necessary for the justices to enquire: first, the rate of wages; secondly, the time he had served; thirdly, what payments he had received. It is objected that the wages for the whole period of service amounted to £70, that sums for which the plaintiff gives credit as payment on account were not payments made to him by the plaintiff on that account, but were really sums appropriated by the defendant to his own use, and that the general account rendered by defendant to plaintiff shews that it was.

The rule is that where justices must ascertain, as an essential ingredient in the case, whether a certain state of things exists, or whether a certain act was done or not, and there is evidence respecting it which they take into consideration, their decision is final, though they come to an erroneous conclusion, *The Queen v. Bolton* (1). But where from the case it appears that they have acted without evidence, then the Court will control the exercise of their authority. The distinction is clearly shewn by *Regina v. Justices of Middlesex* (2,) and *ex parte Vaughan* (3), both cases decided under 59 Geo. 3, cap. 12, sec. 24, which gives jurisdiction to two justices to turn out persons who had been permitted to occupy any tenement provided by the parish for the habitation of the poor, or who shall unlawfully intrude himself into such tenement.

In the first case it appeared on the evidence that the house had been let by the parish authorities to the defendant, and the justices made an order to remove him. The Court reversed the order because the evidence shewed that the party did not come within either of the descriptions mentioned in the statute, but was an ordinary tenant. In the latter case, though the party, and those through whom he claimed, had fifty-five years' possession, and claimed to be owner in fee, yet as the question for the decision of the justices was whether the house fell within the class over which the statute gave them jurisdiction, title was an essential element in the inquiry, and although they had come to a conclusion not warranted by the evidence which they had considered, the Court had no power to review their decision.

(1) 1 Q. B. 66.
(2) 7 Dowl. 767.

(3) L. R. 2 Q. B. 114.

CHARLES BEVAN V. DONALD MCLEOD.

Juror—Affinity—New trial.

On the trial of this cause a verdict was found for defendant. The foreman of the jury was married to a sister of defendant's wife, and plaintiff moved to set aside the verdict and for a new trial, on the ground that this affinity disqualified the foreman.

Held, (Hensley, J., Hodgson, C. J. and Peters, J., concurring) That the foreman was disqualified, and there must be a new trial.

MOTION for a new trial on the ground of the affinity of the foreman of the jury to the defendant, who had obtained a verdict.

7th February, 1870.

Mr. Charles Palmer shews cause.

Mr. Alley, *contra*.

Cur. ad. vult.

7th May, 1870.

HENSLEY, J. This case was tried before me in Hilary Term last, at Charlottetown, and a verdict found for the defendant. Subsequently a rule nisi was moved for and obtained on behalf of the plaintiff to set it aside and grant a new trial on account of the existence of affinity between the foreman of the jury and the defendant. It appeared from the affidavits, and was admitted, that the wife of the foreman of the jury was a sister to the defendant's wife, and the question is, was this an affinity, or a sufficiently close one, to disqualify the foreman from sitting, if objected to, and I think there can be no doubt it was. Husband and wife are held in law to be one person, and from this principle the legal effects of marriage, as regards qualification or disqualification of jurors, is deducible. Consanguinity is the actual relationship of blood, or the being of the same family and stock, and so all such blood relations are disqualified. Affinity, which is not blood-relationship, means properly the tie which arises from marriage between the husband and the

blood relations of the wife, and between the wife and the blood relations of the husband. Consequently whilst the marriage tie, as in this case, remains unbroken, the blood relations of the wife stand in the same degree of affinity to the husband as they do in consanguinity to her. Thus the father of the wife stands in the first degree of affinity to his son-in-law as he does in the first degree of consanguinity to his daughter. Relationship by affinity may also exist between the husband and one who is connected by marriage with a blood relative of the wife, and so it is laid down that, as in this case, when two men marry sisters, they become related to each other in the second degree of affinity as their wives are related in the second degree of consanguinity, which is sufficiently close to constitute a disqualification as a jurymen in a case like the present.—*Co. Lit.* 1122; 1 *Black. Comm.* 441; *Paddock v. Wells* (1), *Charles v. John* (2).

In Bacon's Abridgment (Juries E. 1) it is said that affinity by marriage of either party himself with the cousin of the sheriff or the juror or *e converso* are principal causes of challenge to the array or to the polls, and in note (e) to the text it is said to have been determined that affinity was a ground of challenge to the array. It was held in *Mounson & West's case* (3), that where the sheriff's wife was sister to the plaintiff's wife it was a good cause of challenge by reason of affinity, and in New Brunswick (1843) in the case of *Oulton v. Morse* (4), it was determined that where the sheriff and coroner had married sisters it was a good ground of challenge to the array that the jury had been returned by the coroner in the cause wherein the sheriff was a defendant.

There can be no doubt then that in this present case the objection to the foreman is a good one, if taken at the proper time, as indicated by the Island Statute of 24 Vic. cap. 10, relating to such cases. By the 35th section of

(1) 2 Barb. Ch. R. 331.

(3) 1 Leon. 88.

(2) Year Book 41, Ed. III. 9.

(4) 2 Kerr. 77.

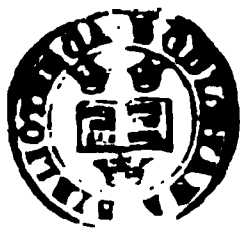
that Act it is ordained that such an objection as the present to a jurymen must be taken before swearing the jurymen and "not afterwards, unless it shall be clearly made out to the satisfaction of the Court, presiding judge or commissioner, that the party making the objection was not in any way aware of and had no notice of the same at the time of swearing as aforesaid, and if the Court, etc., shall consider that the same was material, and really and substantially affected the impartiality and justice of the proceedings, then, and in such case, the Court, etc., if it or he thinks fit so to do, shall, and it or he is hereby authorized and empowered to grant and order a new trial of the cause."

An affidavit was produced, made by both the plaintiff, Charles Bevan, and his attorney, George Alley, to the effect that "they were not aware of the said affinity or alliance by marriage between the foreman and the defendant at the time when the said jury were empannelled, and did not discover the same until the said jury had retired to consider their verdict in the said cause."

The evidence in this case at its trial consisted principally of the testimony of the plaintiff and defendant. Although there was other testimony upon both sides, yet it hardly touched in any material way on the points mainly in dispute. The plaintiff and defendant contradicted each other flatly on not only one but about twenty different points. It thus became a matter almost entirely of the credibility of the parties, and in that way I put it to and left it with the jury. It was thus evidently a case requiring the strictest impartiality and freedom from bias on the part of the jury, and that did not exist. Without finding fault with the verdict, yet the question being one entirely of facts and the credibility of parties, both properly and peculiarly within the province of a jury, and the foreman on account of his affinity being

primarily legally disqualified from sitting as a jurymen, I cannot but conclude that the objection was material, and that the fact that the foreman sat and joined in the verdict "really and substantially affected the impartiality and justice of the proceeding," and, therefore, I am of opinion that the verdict should be set aside and a new trial granted, which is accordingly ordered.

Hodgson, C. J. and Peters, J. concurred.



IN RE ROBERT BELL, AN INSOLVENT.

Appeal from Insolvent Court—Undue preference—Pressure.

The Commissioner of the Insolvent Court refused an order nisi for the insolvent's discharge on the ground that a bill of sale, to secure a debt already due, given to McL., a creditor, shortly before the act of insolvency, was an undue preference. It appeared that McL. demanded the security and threatened arrest if it was not given, and also held out the hope that he would make the insolvent further advances of supplies if the security was given.

Held, (Peters, J.) That to make out undue preference it must appear that the transfer was voluntary, and as in this case it was given under compulsion, the decision of the Commissioner refusing the rule nisi was wrong.

APPEAL from Insolvent Court.

3rd May, 1870.

Palmer Q. C., for appellant.

Mr. Alley, *contra*.

7th May, 1870.

PETERS, J. This was an appeal from a judgment of the Commissioner of the Insolvent Court refusing to grant the order nisi for the insolvent's discharge, on the ground that a bill of sale, given to one McLean, of Halifax, a creditor, shortly before the act of insolvency, was an undue preference. To make out a case of undue preference it must appear that the payment or transfer was voluntary, *i. e.*, originated with the debtor, and was made with intent to prevent the equal distribution of his assets amongst his creditors. If it is made in consequence of threats or pressure by the creditor it is not voluntary, nor if it originated in a *bona fide* application by the creditor. *Doe dem Boydell v. Gilbert* (1), *Mogg v. Baker* (2). Neither will the fact of a conveyance being given in consideration of a pre-existing debt establish a charge of undue preference, if the expectation of time for payment and a further advance *bona fide* acted

(1) 2 C. M. & R. 579.

(2) 4 M. & W. 348.

on the mind of the debtor. *Margarson v. Saxon* (1), cited in Starkie on Evidence 1447; *Mercer v. Peterson* (2).

The insolvent positively swears that Paul, McLean's clerk, who was sent here to examine his books and obtain security, threatened to arrest him if he did not give it. And in McLean's letter, sent by Paul to the insolvent, as well as his instructions to Paul when sent here a second time, "not to leave till he got the security," I think we have strong evidence (whether actual arrest was threatened or not) that pressure of a pretty decided character was brought to bear on the insolvent. The insolvent also states that Paul promised, or led him to expect, that on his giving the security McLean would make him a further advance of goods, and also that no proceedings were to be taken on the bill of sale for six months, both which statements are to a considerable extent corroborated by Paul, who says that but for the discovery, after the execution of the bill of sale, that some bank stock included in it stood in his daughter's name, he thinks McLean would have made him the advances. And if this was the understanding, Bell could not have anticipated that his shop was to be closed and his goods seized and sold under the bill of sale two or three days afterwards, as that event would render further supplies useless. The learned Commissioner of the Insolvent Court appears to have taken the same view of the evidence on this point, for in his remarks on it he says, no doubt Bell expected a further advance would be made to him. Here then we have strong evidence of actual threat, or arrest, or pressure. Secondly, clear evidence of a very decided demand for security. Thirdly, an expectation raised in the debtor's mind of extension of time and further advances which would, naturally, and he swears did, influence him to give the security. And lastly—save the fear of immediate proceedings and the

(1) 1 Younge 525.

(2) L. R. 2 Ex. 304; S. C. L. R. 3 Ex. 106.

expectation of further advances—an entire absence of any reasonable motive for giving McLean a preference over his other creditors.

I do not forget the expression attributed by Paul to the insolvent, “that McLean had always acted as a father to him and deserved to be protected, and that the creditors here might look out for themselves.” Precatory expressions of this kind used by men under such circumstances must be taken *cum grano salis*, as they really reflect little light on their actual motives. The filial affection of the debtor is usually about on a par with the paternal regard of the creditor, both, I fancy, being regulated by the state of the ledger, or expected accommodation, rather than springing from the remembrance of benefits previously conferred.

The case seems an extremely plain one. There is no doubt that the judgment of the Commissioner was erroneous, and must be reversed with costs.

HENSLEY, J.—Concurred.

ORDER MADE BY THE COURT IN THE ABOVE CASE:—

To the Commissioner of the Insolvent Court of Prince Edward Island. Whereas, an appeal from an order made by you in the said Court in the matter of Robert Bell, refusing to grant an order nisi for the discharge of the said Robert Bell from his debts, pursuant to an Act made and passed in the thirty-first year of the reign of Her Majesty Queen Victoria, intituled “An Act for the relief of Unfortunate Debtors,” hath been duly made and entered in this Court. And, whereas, on hearing the said appeal it appears to the said Court that the order so made by you, refusing to grant the said order nisi, was erroneous. It is ordered that the said order so made by you be set aside. And it is further ordered that with what speed you can, you proceed to grant the said order nisi to the said Robert Bell, according to the said Act, and that you do, after the said order nisi is granted, proceed thereon in such manner, according to law, as you shall see proper.

THE BANK OF P. E. ISLAND v. MCGOWAN (SHERIFF).

Limit bond—Action for escape—Demurrer.

Prisoner was arrested by the sheriff (defendant) under an execution, and gave a limit bond under 12 Vic. cap. 1, sec. 1. was set at liberty before justification and continued at large. The sureties never justified, and an action of debt was brought against the sheriff for an escape. Defendant, on demurrer, contended that the prisoner was lawfully at large under the authority of the Act, and that the only remedy against the sheriff was for breach of the bond before justification as pointed out by the Act.

Held, (Peters. J.) That an action for escape could not be maintained, and the only remedy was that given by the Act.

DEMURRER on grounds set out in the judgment.

9th May, 1870.

Longworth, Q. C., for defendant, in support.

Haviland, Q. C., follows.

Mr. McLeod, *contra*; Mr. C. Palmer follows.

Mr. Hodgson replies.

Cur. ad. vult.

29th June, 1870.

PETERS, J. This was an action of debt for an escape. The prisoner being arrested on execution, and having given the usual limit bond, was set at liberty by the sheriff before justification and continued at large. The sureties never having justified as required by the 12 Vic. cap. 1, sec. 1, two points are raised on the demurrer.

First. That the Statutes of Westminster, 13 Edw. 1, cap. 11, and 2 Rich. 2, cap. 12, on which the action is founded are not in force in this Island.

Secondly. That the prisoner was lawfully at large under the authority of the Act, and, therefore, the only remedy against the sheriff is for breach of the bond before justification as pointed out by the Act.

As I am of opinion that the second objection is fatal to this action, it is unnecessary to give my opinion on the

first, though I do not desire to be understood as expressing a doubt that the action lies against the sheriff on the English statute.

It was urged by the plaintiff's counsel that although the sheriff may release the prisoner from custody before the sureties justify, yet unless the justification be perfected within fourteen days the sheriff must retake him into custody, or be liable for an escape. But it is impossible to put such a construction on the Act. It provides that the sureties entering into the bond shall justify before the judge or commissioner, and that notice thereof shall be given by the prisoner to the plaintiff, or his attorney, "at least fourteen days before the time of justification, or for such other period as the judge or commissioner in his discretion may deem sufficient, not exceeding fourteen days." The direction to give at least fourteen days notice implies an option to give a longer notice. The discretion given the judge or commissioner to alter the length of notice is a provision in favor of the prisoner who might have his bail ready the day of the arrest, under it the judge might, if he saw the plaintiff would not be injured thereby, allow the bail to justify the next day, so as to prevent the prisoner needlessly remaining fourteen days in close confinement. The limitation restraining the judge from extending it beyond the fourteen days, on which the plaintiff's counsel based his argument, is also intended to protect the prisoner by preventing the plaintiff, under pretence of inquiring about responsibility of sureties, or for other causes, obtaining an order to extend the period of justification, and, thereby, protract the prisoner's confinement. The permission to the sheriff to set the prisoner at liberty immediately the bond is given is entirely unconnected with any particular period of justification. It, in effect, places the sheriff in the shoes of the sureties until they justify, by providing that "the sheriff shall, nevertheless, be liable for any breach of the bond which may occur, unless the sureties shall

duly justify as aforesaid." After justification the sheriff's liability ceases, and the plaintiff's remedy for escape is not against the sheriff, but on the bond as assignee of the sheriff. The liability of sheriffs for escape of prisoners having liberty of the rules of K. B. was referred to. There is some similarity in this respect that it is optional with the marshal to grant liberty of the rules or not, as it is with the sheriff here to grant liberty of the limits before justification, but there all similarity ceases, for the marshal only takes the bond for his own security ; it is not assignable, and he is, in any event, liable to the action of debt for escape if the prisoner go beyond the rules. Here the act on justification absolves the sheriff from all liability, and before justification only makes him liable for a breach of the bond, the second section expressly declaring that no sheriff shall be liable to any action of escape, etc., on account of any liberty granted to a prisoner on account of this Act. Here the sheriff clearly set him at liberty under the authority of the Act, and, therefore, no action of escape, or any other action save that given by the Act, can be maintained against him.

Judgment for the defendant.

CATHERINE MCINTYRE v. ALLAN MCINTYRE.

Award—Uncertainty—Demurrer.

Plaintiff's declaration set out an award alone, and to this defendant objected on the ground of its uncertainty, as it directed an annuity to be paid plaintiff out of her claims on the property, without shewing what those claims were or on what property they attached.

Held, (Peters, J.) That the award was certain.

2. That an objection to an award on demurrer must appear on its face, or by facts stated in the plea.

DEMURRER to a declaration on an award for uncertainty.

9th May, 1870.

Longworth, Q. C., for defendant, in support.

Haviland, Q. C., follows.

Mr. McLeod, *contra*; Mr. C. Palmer follows.

Mr. Hodgson in reply.

Cur. ad. vult.

29th June, 1870.

PETERS, J. An objection to an award on demurrer must appear on its face, or by facts stated in the plea; *Cargey v. Atkinson* (1). In this case the award alone is set forth. It is objected that it is not certain, inasmuch as it directs that the annuity of £15 shall be paid out of the claims of the plaintiff in the said property without shewing what those claims are, or on what property they attach. An arbitrator on a general submission of all matters, as in this case, need only make his award of such as were brought to his notice (2). Here the submission is general, and the award states "that the arbitrators have been attended by the parties and have heard and considered the allegations of the parties," so that we must suppose that those claims, whatever they were, must have been discussed, considered and understood. In *Harrison v. Creswick* (3), cited in *Jewell v. Christie* (4), Parke B.

(1) 2 B. & C. 170.

(2) Watson on Awards 195.

(3) 13 C. B. 399; 21 L. J. C. P. 113.

(4) L. R. 2 C. P. 298.

says an award will be held final if by any intendment it can be made so. In *Plummer v. Lee* (1), an award directing interest to be paid from date of last settlement, was objected to for uncertainty, but held good on the principle *id certum est quod certum reddi potest*. In *Love v. Honeybourne* (2), an award directing an executor to pay a sum found due out of assets in his hands as executor, was held certain as to the sum, and if it did not amount to a finding that he had assets (which the Court seemed to think it did) then he could plead *plene administravit*. And Watson 209, lays down the rule that everything is to be intended in favor of an award, and the Courts will intend an award certain, unless it appears to be uncertain. In *Wharton v. King* (3), the Court say they must intend there was some contract which made the defendant liable to satisfy a judgment given against the plaintiff. Here the award is that the plaintiff do lease the residence of the defendant, and it then goes on to direct that the defendant should pay the plaintiff £15, annually, during her life, "out of her claims on the said property," and not out of any part or portion of the said property to which the said plaintiff might be entitled in law or equity. It is clear, therefore, that her claims (whatever they were) were discussed and decided on, and as it appears that the plaintiff had heretofore resided with the defendant, it is not difficult to suppose that the plaintiff might have had some undivided life, or other interest in the property from which she was directed to remove, or, at all events, that she had some claim or interest in property under the defendant's control, which formed the subject matter of dispute, the nature of the claim and the identity of the property on which it attached being well understood by the parties. If it really was uncertain, the defendant should have stated the facts shewing it to be so in his plea.

(1) 2 M. & W. 495.

(3) 2 B. & Ad. 528.

(2) 4 Dow. & Ry. 814.

It was argued that as the payments were to be made out of the plaintiff's claims on the property, the fund out of which the payments were to be made might become exhausted, or she might assign her rights, and that then the defendant would have to continue paying the annuity out of his own funds, but we must assume that the arbitrators knew the nature of her claims, and that there must have been some continuing interest attaching on the property, or on the rents, issues, profits or dividends arising from it, which were under the defendant's control, and were not likely to become exhausted. And the award carefully guards against such a contingency by declaring that the payment is not to be made out of any part of the property to which the defendant might be entitled. If, therefore, from exhaustion of the property or funds out of which the payment was directed to be made, or in consequence of her assigning it, the defendant had no longer any control over them, a plea to that effect would bar her action, but on the present state of the proceedings I think the plaintiff is entitled to judgment.

WILLIAM T. ROOM v. A. N. LARGE.

Goods ordered to be "shipped and insured"—Placed on deck where policy would not cover them—Purchaser not liable for price of goods lost.

Large ordered plaintiff to "insure and ship him" certain goods by first vessel. On the trial it appeared that plaintiff sent the goods to the wharf and caused them to be insured by a policy which only covered goods if shipped under deck. The goods were placed, without plaintiff's knowledge, on deck, and on the voyage were lost. Large refused to pay for them on the ground that they had not been "shipped and insured" as ordered. The judge told the jury the order was one transaction, though consisting of two parts, viz., to ship, and to insure, and that the plaintiff must show he both shipped and insured the goods so as to cover them where they were, viz., on the deck, and not having done so there was no insurance and plaintiff was not entitled to recover. The jury found for defendant. The plaintiff now moved to set aside the verdict and for a new trial on the ground of misdirection.

Held, (Hensley, J., Peters, J. concurring) That the direction was right.

MOTION to set aside a verdict and for a new trial on the ground of misdirection.

7th May, 1870.

Mr. Charles Palmer shews cause.

Palmer, Q. C., *contra*.

Cur. ad. vult.

26th October, 1870.

HENSLEY, J. This case was tried in Trinity Term, 1869, and was an action of *assumpsit* brought to recover the price of certain goods shipped by the plaintiff, a merchant residing in Halifax, Nova Scotia, on board a vessel called the "Emerald," to the defendant in Charlottetown, in pursuance of an order in writing contained in a letter from the defendant to the plaintiff, dated 14th October, 1865, to the following effect:—"Insure and ship me by first vessel three crates of crockeryware."

From the evidence of Room himself it appeared that, in execution of the order, he sent the goods from his shop

to the wharf, as he stated, "in the usual way," and caused them to be insured in the Union Marine Insurance Co. there, by a policy which was produced, but which only would have operated and attached as an insurance on the goods if they had been shipped under deck in the hold of the vessel, whereas it appeared that in fact they were placed upon deck, and consequently the policy did not attach. Room stated that he did not know they were placed upon deck until after the vessel had sailed, when he endeavored to get the policy altered so as to cover them upon deck, but did not succeed. In a letter dated 6th January, 1866, Room wrote to Large as follows:—"We insured the goods but could not get insurance on deck load unless we paid exorbitant premiums, indeed we didn't know they were on deck."

On the voyage from Halifax to Charlottetown these goods on deck were washed overboard and so lost. Large refused to pay for them on the ground that Room had not executed his order properly, and had not "shipped and insured" the goods as specially directed, and it was contended that before he could recover he must prove that he had fulfilled the order in both respects. There was no dispute about the facts that as the goods were shipped on deck the insurance effected did not attach to or cover them in that situation.

I told the jury that the order was one entire transaction, although it consisted of two parts, the one to ship the goods, and the other to insure them or cause an insurance upon them to be made, and that although Room might have rejected the order altogether, he could not accept it in part and reject it in part, but by accepting he was bound to execute it in entirety before the defendant could be chargeable, and that when he came into Court, as he did in this action, suing for the price of goods alleged to have been shipped under this written order, it was incumbent upon him to prove not only that he had shipped the goods but had insured them in such a way as would meet the

circumstances of the case, that is to say, as to cover the goods in the position they were in, viz., "upon deck;" that if it really was impracticable to obtain insurance upon them upon deck he ought to have taken due care to obtain their being shipped and stowed under deck, so that the insurance might attach, or otherwise not have shipped them at all, and that as the insurance alleged to have been effected did not relate to or cover the goods where they were *i. e.*, upon deck, it, in law and fact really *quoad* them, amounted to no insurance at all; that Room having failed to prove performance of the order in that respect, was, in my opinion, not entitled to recover from the defendant the value of the goods lost. The jury found a verdict for the defendant.

A rule nisi was subsequently obtained on behalf of the plaintiff to set aside the verdict and to obtain a new trial on the grounds of misdirection, and it was contended that Room was not bound both to ship and insure (and that effectually) he being a merchant only, and not an insurance broker; that the order to insure was not peremptory, neither was the order an entire one, and that the direction to the jury that it was entire, and that Room by accepting it was bound to prove that he had complied with it, both with respect to shipment and insurance was wrong in point of law.

Very few cases were cited upon the argument, but the plaintiff's counsel seemed to base their objections to the direction and verdict a good deal on the ground that the effecting of insurance was not part of Room's ordinary business, he being a merchant or shipper, and not an insurance broker, and that, therefore, his obligation and liabilities as regards the insurance ought not to be construed as strictly as if he was an ordinary and usual agent in such matters, and that, at all events, by effecting an ordinary policy of insurance, although it did not cover the goods where they turned out to be, *i. e.*, "upon deck," he had fulfilled his obligations of the order so far as they

were binding upon him, and was entitled to recover. Phillips on Insurance (vol. 2, p. 563), was cited as setting forth the doctrine that "a general agent is not an agent for effecting insurance where it has not been in the course of business between him and his principal to do so. The case of *Smith v. Cadogan* (1), was also cited, which was an action on the case for neglecting to make an insurance on goods. The defendants were correspondents of the plaintiffs, and there was no dispute as to the order for insurance having been received and accepted, and the only question was negligence in effecting it. The defendants, who lived in London, could not obtain insurance there, but employed agents in Newcastle to effect it there, who succeeded in doing so. The goods were lost, and the agents at Newcastle were applied to for the policy. Some delay took place, but, finally, through the failure of these agents at Newcastle, they having in the meantime received the insurance money from the underwriters, the plaintiffs lost the benefit of the policy. It was held that if defendants had made a blunder in the insurance which would have avoided the policy, that would have been negligence and they would have been answerable, but as the policy was a good one, and it was only owing to the failure of the agents that the benefit of it was lost, the defendants were not guilty of negligence, and not answerable, having done the best they could under the circumstances. This case of *Smith v. Cadogan* (1), so far as it goes, appears to me to have very little bearing upon the present case, but, if any, it is rather an authority against Room's present right to recover. 1st. Because, by want of due care, the goods were shipped on deck instead of in the hold as he thought they were. 2nd. Through culpable ignorance of the place where the goods were shipped, or from want of due care, or owing to blunder or negligence on his part, the only policy of

(1) 2 T. R. (note) p. 188.

insurance effected was avoided or rendered in reality no insurance at all *quoad* the goods in question.

The case of *Smith v. Lascelles* (1), referred to in 2 Phillips on Insurance 563, and in a note to which *Smith v. Cadogan* appears, has a more direct bearing on the present case than the latter, and there Mr. Justice Buller, in delivering the judgment of the Court of King's Bench on an application for a new trial, declares it to be settled as clear law that there are three instances in which an order to insure must be obeyed :—

“1st. Where the merchant abroad has effects in the hands of his correspondent here.

“2nd. If he has been used to send orders for insurance and the correspondent here to comply with them, he has a right to expect his orders will be obeyed, unless he has notice to discontinue that course of dealing.

3rd. If a merchant abroad sends bills of lading to his correspondent here, he may engraft on them an order to insure as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire transaction.” And he adds, “if the commission from the merchant abroad consists of two parts, the one to accept the bills of lading, and the other to cause an insurance to be made, the correspondent here cannot accept it in part and reject it in part.”

The law thus laid down has never since been overruled, and if not a direct authority it, at all events, affords principles of law as guides to the decision of this case, where the plaintiff, Room, bases his claim to recover (and he cannot do otherwise) upon his performance as far as he was legally bound by the written order, which was, in fact, an order to ship goods, with an order to insure them engrafted upon it.

It might have been a question under the evidence whether, even as far as the shipment was concerned,

(1) 2 T. R. 187.

Room performed that part of the order by merely sending the goods to the wharf, and not ascertaining how or where they were stored on board, but it was clear that, whether it arose from negligence or a blunder, no insurance attaching to the goods where they were, *i. e.*, upon deck, was effected.

The policy effected was of no value in law or fact to the defendant. *Quoad* the goods where they were there was no insurance at all ever made, and it was necessary to point this out clearly to the jury, and to state to them, as I did, the principles of law applicable to the decision of the case, and the manner in which they should be applied to it.

I consider that the order in this case was an entire one ; that Room was not entitled to accept it in part and reject it in part, although he might have declined to execute it *in toto*. But, as he sued upon the order, before he could recover he was bound to prove that he had complied with it substantially both as regards shipment and insurance. He should not have allowed them to be shipped in such a part of the vessel as to make such insurance as was effected void and of no effect, in fact no insurance at all, and he was, in my opinion, so far guilty of negligence as to bar his recovery in this case.

The rule for a new trial, therefore, must be discharged.

Peters, J. concurred.

IN THE VICE ADMIRALTY COURT.

THE QUEEN V. THE SCHOONER "S. G. MARSHALL."

Merchant Shipping Act 1854—Deep sea fisheries—Convention of 1818 with United States—Ship sailing under certificate illegally granted liable to forfeiture.

E. Marshall, a citizen of the United States, in 1867 built the "S. G. Marshall," and, knowing he could not get a British register in his own name, took his son, a boy of eight years, to the registrar's office, where he had the builder's certificate filled up, stating E. Marshall, junior (the son), to be the owner, he himself signing as builder. The declaration of ownership was also filled up with the name of E. Marshall, junior, and signed by the boy making his mark. The boy's real name was E. H. Marshall, and he was a British subject. The vessel was always navigated under the register so obtained, E. Marshall, the father, commanding her. In 1870 she was seized while fishing about eight hundred yards from the shore, by Captain Hardinge of the "Valorous," one of H. M. ships engaged in protecting the fisheries. The questions raised were, (1) whether the vessel was a British ship, and (2) whether she was not liable to forfeiture for sailing under a register illegally issued, flying the British flag and falsely assuming the British national character.

Held, (Peters, J.) That she was liable to forfeiture on the latter charge.

The Attorney-General and Solicitor General for the Crown.

Mr. C. Palmer and Mr. McLeod for the owners of the "S. G. Marshall."

1870.

PETERS. J. In this case the schooner "S. G. Marshall" is seized for alleged breach of "The Merchant Shipping Act, 1854," and of the 50 Geo. 3, cap. 38, for regulating the fisheries under the convention of 1818. The facts appearing on the depositions and evidence are these: Ebenezer Marshall, a citizen of the United States, came to this Island in the year 1854, and has since been engaged in carrying on the shore fishery on an extensive scale. About 1867, in consequence of losses, he became desirous of giving up the shore fishery, and taking to the

deep sea or schooner fishery, and with that view built the schooner which is the subject of this action. He states that, knowing he could not get a British register in his own name in 1868, when the vessel was completed he took his son, a boy of eight years old, to the registrar's office, and at his instance the registrar filled up the printed form of builder's certificate, stating Ebenezer Marshall, junior, to be the owner, which certificate was signed by Ebenezer Marshall, the father, as builder. The usual declaration of ownership was also filled up by the registrar with the name of Ebenezer Marshall, junior, and signed by the boy making his mark. The registrar states that he was told to put the name of Ebenezer Marshall, junior, on the register, and that he believed that to be his correct name. The boy's real name is Ebenezer Heenan Marshall, and he was born in this Island, and is, therefore, a British subject. Marshall, the father, states that knowing as an American citizen he could not hold the register, before laying the keel he took legal advice, and was told that his son being a British subject it could be held by him. That he built her for his son, that he might be enabled to educate his two boys, the registered owner and his brother, so that they might have something if anything happened to him, but that he himself was to use her and take her earnings until the amount he had expended, or become liable to pay for her building and outfit, was reimbursed to him. It further appears that on the twenty-first day of March last, the boy, Ebenezer Heenan Marshall, junior, executed a mortgage to I. C. Hall, also an American citizen, for £550. Mr. Hall states that in 1868 he bought the mackerel caught from the schooner by Marshall, and also those caught in 1869. That these fish were packed by him and sent to the United States as British fish, and the duty paid on them; that the schooner has never been out of the gulf; that Marshall told him, when building her, she was to be put in the name of his son, stating that he had taken legal advice and found it

could be done. The vessel has always been navigated under the register so obtained. On the 31st July last she was boarded by Lieut. Dent, of H. M. S. "Valorous." She hoisted the British ensign. That on boarding he asked for the master, and Ebenezer Marshall, the father, came on deck and produced his papers. He asked for his clearance: he said he had none. He asked who was the owner: he replied, "this boy" (holding forth Ebenezer Heenan Marshall). Dent said, "a boy like that cannot be the owner; he is too young." Marshall added, "but I have an interest in her." He asked what countryman he (Marshall) was: he replied he was a British subject. He returned on board and made his report, and was ordered to return and make further enquiries. Mr. Nibblet accompanied him. On that occasion Marshall stated that he was a naturalized American citizen. He then asked for his papers of naturalization. He said he had none, and then he said he was an alien. Some contradiction is given by some of the crew to the statement of Lieut. Dent, as to Marshall's having at first stated that he was a British subject. Any person may misunderstand a conversation; but Lieut. Dent's statement is confirmed by Nibblet, and as it was the particular duty of these two officers to take accurate note of Marshall's replies, they are more likely to be correct than the crew who were standing by; and as one of them said a good deal of talking was going on, answers might have been given which they did not notice; but as the statement, whether made or not, will not have the least effect on the decision I am about to give, it is needless to give it further consideration. On Lieut. Dent's returning and making his second report he was ordered to seize her, which he did. The vessel, when seized, was eight hundred yards from the shore; Cape Haldimand bore south, three-quarters west; McConnell's Point, west by north one quarter north. It is not disputed that the vessel had been fishing in that same place on the day previous.

On these facts two questions arise for me to decide,—

1st. Whether this vessel is a British ship? and

2nd. Whether she is not liable to forfeiture, having been navigated under a certificate of registry not legally granted, and using the British flag and assuming a British national character?

The register is only *prima facie* evidence of ownership, and it is clear that if it appears that a vessel registered in the name of a British subject is really owned by a foreigner, the register is only colorable, and the ship is still a foreign ship. The cases of *The King of the Two Sicilies v. The Peninsula and Oriental Steam Packet Company* (1), and the *Princess Charlotte's case* (2), place the law on this point in a clear light. In the first, a vessel built in England for the defendants was sold to Grannatelli and Scalia, two foreigners. In pursuance, as alleged, of a scheme formed by them and their legal advisers, and in fraud of the British Registry Act, and to defeat the plaintiff's claims, the ship, on completion, was registered in the name of the company from which it had been purchased, and afterwards passed through several transferees who paid no consideration. The transfers were held to be made in fraud of the British Registry Act, and that the transferees were trustees for the foreigner, and the register void. In the latter, the judgment of Dr. Lushington is as follows: "The question for me to decide is whether this vessel, at the time of the necessities being furnished, was a British or a foreign ship. The defendant relies on the British register. The plaintiffs say that the register was improperly obtained, and that the ship was really the property of the Belgian company. Now it is proper to observe that provisions are made by the Legislature, in the second part of the Merchant Shipping Act, for the purpose of preventing ships which are the property of foreigners, from being

(1) 19 L. J. Eq. 202.

(2) Brow. & Lush. Ad. Cas. 75.

registered as British ships. Thus the 18th section begins: "No ship shall be deemed to be a British ship unless she belongs wholly to owners of the following description, that is to say," etc. Unless, therefore, this ship belonged at the time in question to owners falling within the limitation which follows in this section, the register obtained is both false and fraudulent, and is no better than waste paper. It has frequently happened in my experience that both registers and ship's papers have been used for the purpose of claiming a particular national character for a ship. The principle upon which we always proceeded was to endeavor, by every description of legitimate evidence, to ascertain whether the ship was truly entitled to that national character, or whether it was a mere pretence, carried out by the adoption of a piece of bunting the vessel was not entitled to, and by papers which did not contain the truth. We never considered, in all cases I remember, that all question of the ship's nationality was set at rest merely because the papers and the bunting were *prima facie* of a national character.

"The register states the name, residence and description of the owner, 'Arthur Smith Owen, of 16 St. Mary Axe, in the city of London, sixty-four shares,' and as to these facts I accept it as *prima facie* proof. But if *prima facie* proof of these facts, it is also of that which is stated on the other side of the register, of the fact that on the 14th October, 1857, this vessel was mortgaged for £55,000, and interest at five per cent. Now, if there was that mortgage for £55,000, it is the strongest evidence to me that the transfer was colorable; that the vessel was nominally transferred into the name of Arthur Smith Owen for the purpose of carrying out the charter, whilst the mortgage was taken for the purpose of controlling the power placed in his hands. All the other circumstances of the case, and especially the not calling of Mr. Owen, point to the same conclusion, and leave no doubt on my

mind that the true owners of the ship were the Belgian company."

Now, what is the evidence here? Marshall wishes to change his business from the shore to the schooner fishery; but as he could not own the schooner himself, he takes legal advice to see if she could not be registered in the name of his son. If he could have held her himself, can I believe he ever would have thought of this scheme? I cannot. His object, therefore, was to vest the legal title of the vessel so that he could use her in the same way he would have done if he could have taken the legal ownership on himself. I attach no importance to his statement that he did it to educate his boys. No doubt, like all parents, he was anxious to discharge his duty to them in this respect; but he could have done this as well with a vessel in his own name as in his son's, unless a vessel with the privilege of a British ship was necessary to accomplish his purpose. If so, the securing this privilege, not the educating of his boys, was his primary object, and the desire to educate only the cause for entertaining it. Besides, he was to apply the earnings of the schooner to educate the younger boy also. Then he reserves the right to take the funds necessary for that purpose for his own use, as the father, not the elder brother, is bound to educate the younger.

A great deal of evidence was offered to show that Marshall, at the time the schooner was building, declared to many persons that she was for his son. It is said these declarations are part of the *res gestæ*. So they are; but they do not make the impression on my mind they are intended to produce. Declarations accompanying acts may be faithful exponents of a man's intention, or they may be used as a cloak for very different designs. To be free from suspicion they should appear to be naturally elicited. Here Marshall seems to be unusually assiduous in informing every one he comes in contact with that the vessel was building for his boy; and this just after he had

received the advice that the register in the boy's name would give her a legal nationality. It is highly probable that the advice was, that if he gave her absolutely to the boy, as a free gift, fettered with no conditions, and reserving no interest in himself, it would do so. This might account for his activity in informing others about his private business; and the declarations are equally consistent with the intention of an absolute gift, or with an intention to manufacture evidence which might afterwards be useful in covering his real design; and, therefore, although I draw no inference against him from these declarations, I can draw none in his favor from them. All these witnesses say they thought him sincere in making these declarations; and much importance seemed to be attached to their opinions. No doubt he was sincere enough, so far as registering in the boy's name was concerned, for he has done it, but for what purpose and for whose benefit the boy was to hold her they had no means of judging. Marshall's own evidence furnishes a better clew to his intentions. He says he was to use her and retain the proceeds till she repaid him the expenses or liabilities he had incurred in her building and outfit. Is this consistent with an absolute gift? I think not. But there is another very material piece of evidence. On the 12th July, 1870, the boy executes a mortgage to Hall for £550. It is true the mortgage is invalid; but the parties evidently thought it would have some effect or it would not have been made. Now, if the vessel belonged to the boy, what right had Marshall to make him give this mortgage? It must have been for Marshall's debt. It would be ludicrous to suppose that a boy, not more than half-way advanced to the age at which the law considers him to be *doli capax*, could give any assent to it or understand the transaction; and if Marshall (as the act implies) thought he had a right so to deal with her, it is very strong evidence indeed to show that Marshall felt he had a right to deal with her as the real owner.

But I must examine the effect of another circumstance in the case. The boy's true name is not put in the register. It is said that this is a mere inadvertence. It may be so; but in a case like this I am bound to examine accurately into each act done, and the effect it may produce. Now suppose the boy demanded the schooner, and Marshall refused to give her up, and he brings an action to recover her, he must sue as Ebenezer Heenan Marshall. But that not being the name in the register, the register gives him no title to recover. A court of equity might give relief; but the incorrect name would interpose difficulties in the way of the boy's recovering which, under the correct name, would not have existed. Again, the facilities for transferring her to an innocent purchaser, given by the introduction of "E. Marshall, junior," in the register, might interpose obstacles to the assertion of the boy's right of a much more serious description. I am unwilling to attribute improper motives to parties; but I cannot shut my eyes to the consequences which might flow from the alleged inadvertence. Upon the whole evidence, it is impossible to come to any other conclusion than that the register to the boy was merely colorable, for the purpose of giving the vessel a British character, whilst Ebenezer Marshall always has been and is the real owner.

The fact of Marshall's domicile in this Island is inserted in his answer, and, in connection with another defence to which I will presently allude, was a good deal pressed on my attention; and the case of the *Johanna Emelia* (1) was cited, in which Dr. Lushington says: "Mr. Rucher was a Hanoverian, residing at Riga. He was domiciled there for many years, and must, therefore, in consequence of his domicile, in all that relates to his national character, be taken to be a Russian, not a Hanoverian." But that was a case of capture of a supposed enemy's vessel during the Russian war. The object of such captures, during war, is to cripple the enemy's trade, and as, for

(1) 29 Eng. Law & Eq. R. 565.

the purposes of trade, every man is considered to belong to the country in which he is resident, his domicile in such cases is all that needs to be inquired into; and that being proved to be in an enemy's country, the right to judgment of condemnation against the vessel is established. But that rule can have no application to a case where (in a state of peace) an alien claims a right to own property which none but British subjects are permitted to own. In such case naturalization in the legal way (not domicile) can alone give him that right. But the defendants set up as a defence that, although Marshall is an American citizen, his father was Scotch and his mother Irish, and he is, therefore, under the statute of Anne, a natural-born British subject, and, therefore, that the vessel is not liable to forfeiture on account of his ownership; and this would be, doubtless, a good defence, according to Wall's case, even though his father had taken the United States oath of allegiance. The evidence to support this defence rests entirely on his own testimony that such is the case. The statute makes the party a competent witness; but the weight of the evidence rests with the judge who has to consider it; and my experience has led me in cases like this, where the temptation to state what is untrue is great, and the means of detection and contradiction are difficult to be obtained, to assign no appreciable weight to such testimony. I would, therefore, on this evidence, decide against the defendant's plea of British origin. His counsel, however, urged that further time should be allowed him to procure further evidence in support of it; and considering that the vessel has been very recently seized, and that the natural desire of the defendant to get a release before the fishing season has passed, might induce him to risk a trial on weaker evidence than he might otherwise have produced, I should have acceded to their application if the decision I have come to on the second point had not rendered that defence unavailing, and, therefore, I do not mean to found my

judgment on the first point. On the second point, the vessel is clearly liable to condemnation. The 52nd sec. of the Merchant Seamen's Act provides that "if the master or owner of any ship uses or attempts to use, for the navigation of such ship, a certificate of registry not legally granted in respect of such ship, he shall be guilty of a misdemeanor, and it shall be lawful for any commissioned officer on full pay in the military or naval service of Her Majesty, or any British officer of customs, or any British consular officer, to seize and detain such ship, and bring her for adjudication before the High Court of Admiralty in England or Ireland, or any Court having admiralty jurisdiction in Her Majesty's dominions," and the effect of the 19th, 106th, and 103rd sections is to render any ship not entitled to the character of a British ship, whether owned by qualified or unqualified persons, liable to forfeiture if she flies the British flag or assumes the British national character.

That the register, in this case, is not legally granted, cannot be and is not denied by the defendant's counsel, as it was granted to an infant who could not make the declaration; but it is urged that the 52nd section does not apply to this case, the registrar himself having done wrong in taking the infant's declaration, and that the error in the name arose from mere inadvertency.

The second part of the Merchant Shipping Act is very stringent with respect to all that concerns the registry, and necessarily so, to prevent frauds, and to preserve its integrity. The provision of the 40th section is as follows: "Upon the first registry of a ship there shall, in addition to the declaration of ownership, be produced the following evidence, that is to say, first, in the case of a British-built ship, a certificate (which the builder is required to give) containing a true account of the proper denomination and tonnage of the ship, and time when and place where she was built, together with the name of the party on whose account he built the same. Section 44 provides that on

the completion of the registry, the registrar shall grant a certificate, in the form marked D, containing the following particulars, that is to say, 5th, the name and description of the registered owner or owners. The 43rd section provides that, subject to any rights appearing on the registry books to be vested in any other party, the registered owner of any ship, or share therein, shall have absolute power to dispose, in manner hereinafter mentioned, of such ship, and to give effectual receipts for any moneys or money advanced by way of consideration.

The great power given to the registered owner shows the importance of his name being correctly stated. If it is not he cannot transfer; but if a certificate gets out of his hands, others with names identical with that in the register easily may. Deeds are often held good, though there be a mistake in the name; but then it is a matter of contract, and there may be something descriptive to correct the error; and there is no stringent statute operating on the transaction to prevent it. In Sheppard's Touchstone, 236, it is laid down, "but where the grant doth intend to describe the person of a party by his proper name, and doth omit or mistake his christian name, in this case, for the most part, the grant is void, unless there be some special matter to help it." But no evidence could, I think, be permitted to explain or add to the register. McLaughlan, after commenting on the register and its requisites, says (1), "the integrity of the register being of the utmost importance to society, it is of equal moment that the keeper of it should use caution and refuse to make an entry, save upon such evidence only as, being within the requirements of the Act, would satisfy a court of justice." And again, he says (2), "the function of the register is to be authentic evidence to Her Majesty's officers, and afford a ready means of information in any quarter of the globe as to who are some of the

(1) 2nd edition. 77.

(2) 2nd edition, 83.

responsible persons when penalties have been incurred in connection with the ship."

It was urged that this was in the nature of a criminal proceeding, and that if the name was given *bona fide*, though the register is not legal, the party would not be guilty of a misdemeanor, and, for the same reason, the vessel should not be condemned; but if he were tried for the misdemeanor the jury must find it was a mistake before they could acquit him, though the wrong name may not have been intentionally given. I certainly cannot say that it was not, and it must be observed that if the boy had been legitimate, the *cui bono* would not have been so strong, for then the father's parental guardianship would have given him entire control of the property; but as the son was born before marriage the law would not recognize him as guardian. Marshall would, therefore, have no control over this property, and the boy might, at any time, bring an action and recover the vessel, while, in case the boy died, not being of kin, Marshall could have no claim to her whatever, and could never get her back. He, therefore, ran a tremendous risk in registering the boy as owner. against which he would be naturally anxious to provide some chance of escape; and it might readily occur to him that similarity of name in such an event would prove a friend in need. That an act done inadvertently should so exactly tally with his interest is at least a remarkable coincidence; and it must be observed that the offence which causes forfeiture of the vessel is the using a register not legally granted—not the illegality of procuring it—and the defendant was aware of all the facts relating to it. The discretion of the judge is directed to ascertain whether the evidence sustains the charge. The use of the register being clearly proved, and its illegality so patent that it cannot be denied, my duty is plain. If penal statutes, in particular cases, press too hard, the Crown has the power of mitigating their severity. The judge has none.

As to the argument that the registering officer is to blame, the answer is, that the person who seeks the register has to make a legal declaration and give a true description of himself. The registering officer, in this case, displayed gross ignorance of his duty, and most culpable negligence, and his conduct in taking the declaration of this little boy is most reprehensible. That does not excuse the defendant, Ebenezer Marshall, who was bound to know that a boy could not make the declaration, and who could have given the correct name. In *Mann's case* (1), where a shareholder in a company transferred shares to an infant, a similar point arose. Sir John Rolt, L. J., said, "it is, however, contended that there is a duty thrown upon the directors to inquire whether the proposed transferee is a proper and competent person to be a transferee, not merely that they had the power to reject an improper person, but that it was their duty to do so, and that they neglected this duty, and that the company are, consequently, estopped from saying this transfer was a nullity. I think this argument cannot be sustained, and the answer to the following question shows that it is so: 'Was there any greater or prior duty cast upon the company of inquiring whether Mann's transferee was a proper person than upon Mann, the transferor himself, of so doing?' Both Mann and the company took it, as a matter of course, that the transferee was a proper person. The nomination by Parkinson of Symes, as the transferee, amounted to a declaration that Symes was a proper person. Surely the first duty of ascertaining that his transferee was a proper person was cast upon Mann himself. Therefore I think that Mann still remained a shareholder." The principle on which this case was decided is so applicable to this question that I think it decisive on this point.

With respect to the charge of flying the British flag and assuming a British national character, the latter part

(1) L. R. 3 Ch. 459. n.

of the first clause of the 103rd section enacts, "that in any proceeding for enforcing forfeiture, the burthen of proving a title to use the British flag and assume the British national character shall be upon the person using the same." What title have the defendants shown to use that flag? They produce, as their authority for doing so, a piece of paper purporting to be a register, but which, from facts within the knowledge of the real defendant, was worth no more than a piece of waste paper.

There is one circumstance to which I ought to allude. Captain Marshall complained that, after arriving in port, restraint was put on his person, and his communication with the shore interdicted by Captain Hardinge; and as the charge was made in giving his evidence, I permitted Captain Hardinge to be called to explain it. He stated that he arrived in port late in the evening; that he communicated with the Administrator the next day, and was told not to detain him; that his impression until then was that he should be detained. And, in my opinion, before communicating with the Administrator he would have erred in discharging him. Under the statute Captain Marshall was liable to be prosecuted for misdemeanor; and if the Government intended to prosecute might have detained him till he entered into recognizance for his appearance; or, if his evidence was deemed material respecting the seizure, to enter into recognizance to appear as a witness. The officer in charge of the schooner states that early the next morning he informed Captain Marshall he had orders to discharge him, and that a boat was ready for him when he wished; that he remained, of his own accord (getting his things together as he believes), an hour or two after that, and when ready, was landed. This officer also states that he informed Captain Marshall that if he wished to communicate with his friends on shore he had orders to let him do so through the "Valorous." Captain Hardinge was certainly not bound to allow direct communication

between the shore and the schooner, and he appears only have followed the rule of the service in respect to such cases.

I have gone through the evidence, and stated my reasons for the conclusions I have arrived at on the various points at considerable length, in order that the parties might understand the grounds of the decision, and also find their proceedings facilitated should they desire to test its correctness in a higher Court. But in consequence of the opinion I have expressed, that the defendant should (if the case rested on the first point) have further time to procure evidence to support his plea of British origin, the judgment will rest wholly on the charges of navigating under a register illegally issued, and flying the British flag, and falsely assuming the British national character. And it is, therefore, proper, before giving judgment of condemnation, to give the Attorney General the option of taking the judgment on these grounds, or of waiting the result of further evidence on the other charge.

The Attorney General having elected to take judgment the Court proceeded to pronounce judgment of condemnation against the vessel, her apparel, furniture, etc.

HALL & MARSHALL V. YATES.

Merchant Shipping Act, 1854—Vessel, “her tackle, apparel and furniture” includes her equipments necessary for the purposes of her voyage and adventure—Forfeiture.

Under the general order of the Court of Vice Admiralty for the sale of the “S. G. Marshall,” “her tackle, apparel and furniture,” the defendant, who was marshal of that Court, sold a seine, a lot of barrels, salt, bait, bait-mill, nets and a seine boat, which she had on board, though they were not mentioned before the Vice Admiralty Court, nor any judgment given against them specifically. The plaintiffs, who were joint owners of these articles, and of all other outfits on board, brought an action of trespass against the defendant. At the trial a verdict was found for plaintiffs, and leave given defendant to move to set it aside and to enter a verdict in his favor. The question then was whether these articles, being the vessel’s outfit for her voyage and adventure, were included in her “tackle, apparel and furniture.”

Held, (Peters, J., Hodgson, C. J. concurring; Hensley, J. dissenting) That the articles were part of the ship’s tackle, etc.; and that the verdict must be entered for the defendant.

MOTION to set aside a verdict found for plaintiffs, and to enter it for defendant.

28th January, 1871.

Mr. McLeod shews cause; Mr. C. Palmer follows.

Mr. Davies, *contra*.

2nd May, 1871.

PETERS, J. This was an action brought against the defendant, who is Marshal of the Vice Admiralty Court. In July last the schooner “S. G. Marshall” was seized by Captain Hardinge, Commander of H. M. S. “Valorous,” appointed to protect the fisheries, and prosecuted in the Vice Admiralty Court for alleged breach of the Merchant Shipping Act, and also the Act 59, Geo. 3, cap. 38, for regulating the fisheries under the convention of 1818. For reasons stated in the judgment given in the Vice Admiralty Court, the condemnation was confined to the charges under the Merchant Shipping Act, viz., “for

using for navigation of the vessel a register not legally granted, and for flying the British flag and assuming the British national character," and under these latter charges judgment of forfeiture was pronounced against the vessel, her tackle, apparel and furniture. It appears that when the vessel was seized she had on board the following articles, viz :—

1 seine net,	value	£423	11	6
194 barrels,	"	43	13	0
$\frac{1}{2}$ do,	"	7	19	3
Salt,	"	27	18	0
14 barrels bait,	"	21	0	0
1 bait mill,	"	4	10	0
Dip nets,	"	3	0	0
Boat for use of seine	"	30	0	0

No mention was made of these articles before the Vice Admiralty Court, nor any judgment given against them specifically, but they were sold by the defendant under the general order for sale of the vessel, her tackle, apparel and furniture.

From the evidence it appeared that the seine, when employed in catching fish, is sent out in boats from the vessel and drawn in the sea, sometimes at a considerable distance from the vessel, but the captured fish are put in the vessel. Mr. Hall's testimony on this point is as follows: "The seine is used in fishing with two boats, it is drawn round the fish and then pulled up. It cannot be used from the vessel. We put it on board the vessel to transport it to the fishing ground, but when in use it is towed in a large boat behind the vessel from place to place. We usually have a seine master to take charge of it; he belongs to the vessel and sleeps on board when at sea. It is used from the shore or at sea. Several vessels sometimes have one seine. I have known a British vessel and an American vessel to use one seine. The seine boat is not for the use of the vessel, but it goes with the seine. If a vessel goes on a fishing voyage the seine and boat are

taken to catch fish." The seine was in the vessel at the time of the seizure, and there was no pretence of an intended joint user of it with any other vessel. It also appeared that vessels engaged in this fishery generally fish with hook and line, and that seines are used, only to a very limited extent, in addition to the hook and line usually employed. Mr. Dean, a witness long engaged in the fisheries, stated that out of six hundred or seven hundred vessels employed last year in this business he only knew of three that had seines. The question raised on these facts is, whether all or any of the articles mentioned are tackle, apparel or furniture, liable to forfeiture under the Act, and the verdict is to stand, be reduced, or entered for the defendant according to the opinion of the Court. Parsons, in his book on Contracts, vol. 2, p. 273, says, "by the phrase 'a ship with all her appurtenances,' or 'with her apparel,' or 'furniture,' or any equivalent phrase, and even as we should say by the word ship alone (or barque, brig, schooner, etc.,) whatever is then on board of or attached to her to adapt her for the voyage or adventure in which she is engaged, passes as a part of the ship to him who buys her. There have been many adjudications on this question, and it might sometimes be affected by usage, but generally the rule is not capable of a more precise definition."

In *Gale v. Laurie* (1), which was an action for damages against a vessel called the "Dundee," a Greenland whaler, for running down the plaintiff's ship, the defendant contended that under 53 Geo. 3, his liability was limited to the value of the ship, and that he was not liable in respect of stores not required for her navigation, but only for the objects of the voyage. The special verdict found that the fishing stores belonging to Greenland whalers consisted of harpoons, lances, boats, and various other things for the purpose of catching whales and other fish, and casks for containing and bringing

(1) 5 B. & C. 156.

home the blubber, oil, etc., and that, according to the usage of trade, such things would not be covered by a policy on the ship, her tackle, apparel and furniture, and that the "Dundee's" stores were of the value of £2,223. Abbott, C. J., says, "the fishing stores were not carried on board the ship as merchandise, but for the accomplishment of the objects of the voyage, and we think that whatever is on board a ship for the object of the voyage and adventure on which she is engaged, belonging to the owners, constitute a part of the ship and her appurtenances within this meaning of the Act."

"This construction furnishes a plain and intelligible general rule, whereas if it should be held that nothing is to be considered as part of a ship that is not necessary for her navigation or motion on the water, a door would be open to many nice questions and much discussion and cavil."

These authorities seem to establish the proposition that whatever is on board a vessel or attached to her, to adapt her for the voyage on which she is engaged, is deemed in law as part of her tackle, apparel and furniture. It is not contended that the provisions, hooks and lines, with which only such vessels are usually fitted out, are not comprised in the condemnation, but it is argued that as the seine was an article not generally used by vessels engaged in such fisheries, and not intended to be used, like hooks and lines, from her, it cannot be considered part of the vessel, her tackle, apparel or furniture. I confess I was much impressed on the argument with Mr. McLeod's reasoning on this point, but on the best consideration I have been able to give it, I am satisfied that these circumstances do not withdraw it from the general rule applicable to other fishing stores. It may be quite true that such vessels do not usually carry seines, but the question under this Act of Parliament is not whether such things are generally used, but whether this seine

was carried on board this vessel for the purposes of enabling those on board to capture fish, that being the object of the voyage. The evidence of Mr. Hall shews that all the crew shared in the fish taken with it, as well as those taken with the hook. He says, "when we send a seine with a half line vessel the seine and boat draw a share, sometimes a fifth, sometimes an eighth, according to agreement. In some cases each man pays so much for the use of the seine and boat, but this depends on the agreement." In this case as the seine was intended to be used to carry out the object of the voyage, it seems to come within the very words of the rule laid down by Abbott, C. J. in *Gale v. Laurie* (1). But it is said that the word "appurtenances" has a more extensive meaning than furniture, a remark which fell from Lord Stowell in the case of *The Dundee* (2), but on the same facts in the King's Bench, Abbott, C. J., seems to have thought there was little difference between them. He says, "the first section on which the question arises is to be understood as if the words 'with all her appurtenances' were used, supposing those words would have made any difference." But assuming the word "appurtenances" to be more comprehensive than "furniture," is not the latter word sufficiently comprehensive to include this seine and other outfits placed on board for the purpose of the voyage? Webster's explanation of its meaning is, "that which furnishes or with which anything is furnished or supplied, fitting out, supply of necessary, convenient, or ornamental articles for any business or residence." The plaintiff, Hall, states that he and Marshall fitted out the vessel, and that they were joint owners of the seine and all other outfits, and the seine (though not absolutely necessary) was, evidently, put on board as a convenient means of more successfully prosecuting the objects of the voyage. The kind or number of appliances used to carry out any enterprise often very much depends on the pecuniary

(1) 5 B. & C. 156.

(2) 1 Hagg. Ad. 109.

ability of those engaged in it. But the novel or more numerous outfits of a wealthy owner are not the less outfits because many with less means are content to carry on similar operations with fewer or more simple appliances. Comparatively few ships carry chronometers, yet in *Langton v. Horton* (1), a bill of sale of a ship with her tackle and appurtenances, was held to pass a chronometer not specifically mentioned. It is true, in *Richardson v. Clark* (2), Judge Emery decided that a chronometer, under similar circumstances, did not pass, but the English decisions are those which we regard as authorities, and they seem most consistent with the general doctrine laid down in the American text books. Neither do I think that the circumstance of the seine being used, not from the vessel, but from boats, alters the case. In *Gale v. Laurie* (3), the harpoons, lines, and other appliances for taking fish were to be used in a similar manner. Again, it is said that as the seine was really owned by the plaintiff, Hall, who was not the owner of the vessel, it is not liable to forfeiture, the intention of the Act being (it is argued) to limit the forfeiture to outfits belonging to the owner of the vessel, or to things attached to her, or necessary for her navigation, and the hardship of a contrary construction on an innocent person who has put his property on board for a particular enterprise was strongly insisted on. The 52nd section of the Merchant's Shipping Act enacts that if the master or owner of any ship attempts to use, for the navigation of such ship, a certificate of registry not legally granted in respect of such ship, he shall be guilty of a misdemeanor, and any commissioned officer in the naval or military service of Her Majesty may seize her and bring her for adjudication before any Court of Vice Admiralty, and if such Court is of opinion that such use or attempt at use has taken place, it shall pronounce such ship, with her tackle, apparel and

(1) 6 Jur. 911; S. C. 5 Bear. 9. (3) 5 B. & C. 156.

(2) 15 Maine 421.

furniture, to be forfeited to Her Majesty." The Legislature must have been well aware of the general rule respecting stores, and there is nothing in this clause which shews any intention to except tackle or furniture which has been lent or hired to the owner of the vessel, or which belongs to a person who (as in this case) has made himself a partner with the owner in the voyage and adventure, from the general words which in themselves comprise everything which constitutes the tackle, apparel and furniture on board at the time of seizure. Where exceptions from forfeiture are intended the Act seems carefully to provide for them. Thus the acquirement of an interest by an unqualified person forfeits his share, but the Act expressly excepts cases of shares transmitted by death, bankruptcy, etc. The interests of innocent owners are, in many cases, affected by the delinquency of others. Thus flying the British flag, or assuming the British national character on board a ship owned in part by a disqualified person forfeits the shares not only of the disqualified person, but of those also who are qualified. Mr. McLaughlin, in commenting on these sections, says, "and in proceedings to have the forfeitures declared, the *onus* of proving title to such use and assumption is cast on the person making it. This is a forfeiture which may involve the property of British subjects, who are, therefore, bound by regard to their own interests to see that no part owner of the same ship with themselves is a person disqualified to own a British ship." This seems quite as severe against qualified owners as the forfeiture of fishing stores and implements owned by one who is only a partner in the adventure upon a particular voyage. The Act seems to leave the one to watch against the contamination of disqualified ownership, and the other to ascertain by his own vigilance that the vessel he fits out is entitled to the character she assumes. It is true, in *Gale v. Laurie* (1), Abbott, C. J., says whatever is on board for the purpose

(3) 5 B. & C. 156.

of the voyage "belonging to the owner," but he says so because by the express words of 52 Géo. 3, cap. 1, sec. 9, on which the question arose, the owner's liability was restricted to the value of his own goods. So on a policy or bill of sale the interest of the insured, or right of the vendor, limits the underwriter's liability or the vendee's right. But that does not affect the abstract rule laid down for ascertaining what constitutes the furniture or appurtenances of a vessel at any particular period.

It is urged that this is a penal statute and must be construed strictly. The statute is, no doubt, pregnant with penalties and forfeitures, but it is a statute made for regulating and protecting interests of the highest importance to a great maritime nation, and while we take care not to draw cases within its penal clauses by implication, we must be careful not to exclude those which, under the ordinary meaning of the words used, come within them. The rule so generally quoted, that penal statutes are to be construed strictly, does not authorize the judges to make the law what they think reasonable in particular cases, it only means that where the intention of the Legislature is doubtful that construction which absolves from forfeiture shall be adopted. But, as remarked by Broom in his Legal Maxims, "the rule must not be so applied as to narrow the words of a statute to the exclusion of cases which those words, in their ordinary acceptance, would comprehend." The observance of fiscal laws, which there is strong temptation to evade, is enforced by forfeitures which often affect the property and rights of innocent persons. In such cases Lord Stowell observes (2 Dod. Admir. C. c. 271) "it is sufficient if there be a contravention of the laws a *fraus in legem* whether that may have arisen from mistaken apprehension, from carelessness, or from any other cause, it is not material to enquire." That innocence of intention or mistake is also no answer to forfeitures incurred for breach of laws for preserving the nationality of shipping

is strongly shewn by the cases of *The Venus* (1), and of *The United States v. The Bartlett* (2), determined in the Courts of the United States. In the first, "of two partners in a commercial house doing business in New York, one, Lennox, resided in New York, the other, Maitland, was a resident merchant of Great Britain. To obtain a register Lennox made oath in New York that he, together with Maitland, of New York, were the only owners. At the time Maitland was domiciled in Great Britain. The Court held that the vessel was subject to forfeiture, although the oath was taken innocently, and in ignorance of the character imparted to Maitland by his residence in England."

In the latter *The Bartlett* (2), it was found that enrolments in a certain custom house were occasionally made as a matter of convenience on the oath of the master only, but on a case coming before the District Court of Maine, it was held that such an enrolment was wholly void and could not confer upon the vessel the rights and privileges of a vessel of the United States.

It was argued that the forfeiture of articles owned by third persons must be confined to things necessary for navigation. But why stop there? If, notwithstanding the rule that whatever is on board a ship to adapt her for the purpose of the voyage is part of the ship, her tackle, apparel or furniture, and the express words of the statute, "that the ship, her tackle, apparel and furniture shall be forfeited," some articles owned by third persons are to be exempted, why should not anchors, sails, etc., be equally exempt? It seems to me before you can draw a line between property of third persons, put on board for one purpose of the voyage, and that put on board for another purpose, you must shew some authority in the statute (similar to that in 53 Geo. 3) authorizing you to draw such a line, and if you cannot you must accept the

(1) 5 Wheat. 127.

(2) Davelis (Maine) 9. 2 Parson
Mar. Law, 38.

application of the express words of the statute to the rule with all its resulting consequences, and that either all property of third persons put on board is exempt, or none is so.

From the peculiar hardships of this case, as regards Mr. Hall, I must confess I set myself to consider it with a strong desire to come to a different determination, but the authorities are, in my opinion, too conclusive to admit of any other result than that I have arrived at.

I have not thought it necessary to advert to the numerous cases cited on the argument as to the effect of the words "furniture," "appurtenances," etc., in policies of insurance and bills of sale, because I think the general rule which makes these words comprehend all stores intended for the purposes of the voyage, well established, and that usage or custom is admitted in those cases, not as denying the rule, but on the ground of an implied conventional limitation of it to a smaller class of things than those words in their ordinary meaning would comprehend, and, therefore, those cases cannot apply to the construction of a statute where no such limitation is expressed or implied.

I think the verdict should be entered for the defendant.

HODGSON, C. J., concurred with Mr. Justice Peters.

HENSLEY, J. This was an action brought against Albert H. Yates to recover the value of a seine and other articles, being fishing stores, lines, and implements of the value of £574 15s. 4d., as set forth in the special verdict of the jury for that amount, found on the 18th day of January last, as appears on the minutes of this Court, and of which the following is a copy :

"We find the defendant guilty, and assess the damages at £574 15s. 4d., according to the schedule hereunto annexed."

(See Mr. Justice Peter's judgment for list of articles in schedule.)

It also appears that these articles were sold by Mr. Yates in his official capacity as Marshal of the Vice Admiralty Court of P. E. Island, under an order for sale issued to him by that Court upon a judgment of condemnation of the schooner "S. G. Marshall," her tackle, apparel and furniture, pronounced under sections 52 and 103 of the Imperial Merchant Shipping Act, 1854, for, in the first place, using an improper certificate of registry, and, in the second place, for unduly, under such circumstances, using the British flag and assuming the British national character, for which offences the statute declares, as regards the using the improper certificate of registry, the ship with her "tackle, apparel and furniture" shall be forfeited to Her Majesty, and as regards the undue use of the flag, or assuming the British national character, "the ship" shall be forfeited to Her Majesty.

The order for sale follows the judgment of the Admiralty Court, and directs the Marshal to sell the ship, "her tackle, apparel and furniture," in this following, in terms, the sentence or judgment of condemnation.

The question which the Court is called upon to decide in this case is whether the fishing stores, seine, lines, implements and boat enumerated in the verdict come under the terms of condemnation used of the ship, her tackle, apparel and furniture, and are included in them, or whether rather the meaning and legal construction of those terms include only the ship herself, and whatever she had on board absolutely necessary or relating to her ordinary navigation, independent of her special occupation at the time.

For this purpose it becomes necessary to examine what from time to time, by their decisions, courts of law have held the terms, "ship, her tackle, apparel and furniture," to mean and include, and this whether in the case of conveyances by bills of sale, of contracts for insurance, or

where those or similar terms have been made use of in statutes. And here, I may remark, that I see no reason why the terms, when made use of in a statute, much more in a penal one, should be held to be any more comprehensive or extensive than when made use of in bills of sale or contracts of insurance (no usage interfering), unless the plain object or words of the Act seem to require it.

The cases on the subject are very well summarized in Abbott on Shipping, Newhall and Arnould on Marine Insurance, and Parsons' Maritime Law, (1859, vol. 1, p. 71) and from these cases it appears that the ancient writers on Maritime Law held that if a ship be sold with the tackle, apparel, furniture and other instruments thereto belonging, the ship's boat is not conveyed by these words, and they found their opinion upon those parts of the digest in which it is said that the boat is not a part of the ship or of her apparel (1). The latter adds that if a ship commits piracy the boat is not forfeited, and refers to a case in Roll. Ab. as his authority, and Beawes has followed the words of Molloy, but in the case referred to the boat is not mentioned. See the case of *Sharmon v. Owen & others* (2).

Ballast in an early case, *Kynter's case* (3) was held not to be "furniture," for although in some cases necessary it is not always so, and "ships may be laden with such merchandise as is convenient ballast of itself" with advantage to the ship and owner.

In *Lano v. Neale* (4), a ship was conveyed with all stores, tackle, apparel, etc., but no mention was made of "kentledge," or permanent ballast, consisting usually of pigs of iron cast in a particular form, or other weighty material, which, on account of its superior cleanliness and

(1) Roccus, note 20. Stra.	(2) 1 Man. & Ryl. 392.
Nav. pass. 2. No. 12.	(3) Leon. 46.
Molloy de Jure Mar.	(4) 2 Starkie 105.
Bk. 2, Ch. 1, sect. 18.	

the small space occupied by it, is now frequently preferred to ordinary ballast, but Lord Ellenborough ruled that it could not be considered as part of the ship's necessary stores, since common ballast might have answered the same purpose.

So in *Burchard v. Tapscott* (1), where the bill of sale conveyed the vessel with her masts, bowsprits, sails, boats, anchors, cables, and all other necessities thereto appertaining and belonging, it was held that ballast of any kind whatsoever on board at the time of the sale would not pass as a necessary appurtenance to the ship.

Parsons remarks that from these cases it would seem to be deducible that nothing is to be considered an appurtenance of a ship unless requisite for its proper use, although connected with it at the time.

In the case of *Hoskins vs. Pickersgill* (2) a question arose whether the fishing tackle was included under the terms "ship furniture, &c.," in a policy of insurance on a ship employed in the Greenland Fishery. Lord Mansfield said there was no doubt but that the boats, rigging and stores belonging to the ship were included, but that as to fishing tackle in insurance cases it must depend on the usage of trade. The jury found for the plaintiff but the Court afterwards set aside the verdict, holding that the evidence was in favor of not including the "fishing tackle" in the general terms of "furniture, tackle and apparel." This case seems to me to decide that in the absence of any usage to the contrary the "fishing stores, tackle, &c.," are not to be held included in the general definition just referred to.

So far as the cases already referred to went, there has been nothing to show that either by legal definition or judgment the general terms used in the Merchants Shipping Act, 1854, "ship, her tackle, apparel and furniture," are sufficiently comprehensive to embrace the seine, fishing stores, implements and boat in question,

(1) 3 Duer. 363.

(2) 2 Marsh. Ins. 765; Park 97.

but there was a subsequent case much referred to on the argument in this case, being the case of the *Dundee* (1) and *Gale vs. Laurie* (2) arising out of the same transaction and in which the principle of construction applicable to general words has been more clearly exemplified than on any former occasion and which, if a case in point with the one now under consideration, and exactly identical in terms and expressions would, no doubt, be conclusive in favor of the defendant in the present suit. The "Dundee" being bound on a voyage to the Greenland Fisheries collided with and sank a vessel called the "Princess Charlotte" with her cargo and fishing apparatus. She was arrested in the Admiralty Court and the action entered for £9000 against the ship, her tackle, apparel and furniture. Independently of the sailing stores which are necessary for the purposes of general navigation the "Dundee" had on board, boats, fishing-tackle (such as harpoons, lines and rockets), casks and various other implements commonly called fishing stores and a question having been raised as to the liability of the "Dundee" beyond the value of the "ship, her tackle, apparel and furniture," it was agreed that separate valuations should be made and the point reserved as to the question of liability till it was ascertained whether the "Dundee" was in fault. Accordingly the "ship, her tackle, apparel and furniture" were valued at £2,685 and her fishing stores at £2,236, and bail was given for £9000, without prejudice to the question of the liability of the owner beyond the appraised value of the "ship, her tackle, apparel and furniture." The "Dundee" was found to have been in the wrong and the question of liability was then argued. And here it is observable that the case first presented itself to the Court, not on the question as to what constituted the "ship, her tackle, apparel and furniture," but whether in addition to the value of those, the owners

(1) 1 Hagg. Ad. 109.

(2) 5 B. & C. 156.

of the "Dundee" under the Statute 53 Geo. III, Cap 159, were further liable for the value of the fishing stores.

Although the original proceeding was simply for the "ship, her tackle, apparel and furniture," it appeared that in the agreement respecting bail and the separate valuations just referred to, it was undertaken that "bail shall be put in and perfected in the cause to the amount of the value of the ship and appurtenances," and on this last word "appurtenances," being a term used in the Statute 53, Geo. III, Cap 159, much of the argument and it appears to me the judgment materially turned. It was argued for the "Dundee" that the introduction of this word into the agreement for bail could not permit the case to embrace more than it did at its inception and also that the word itself, "appurtenances" did not include more than what was absolutely necessary for a navigating ship and not for her incidental trade and did not include the means taken on board for the success of that trade. Lord Stowell delivered judgment and referred to the various laws which from time to time had been in force in England regulating compensation in case of embezzlements by crews of ships and in cases of collision, and he referred to the Statute in that case in question, 53 Geo. III, 159, thus, "The latter Statute in the 1st enacting clause subjects the ship, tackle, apparel and furniture and its 'freight,' but in the following clauses particularly in the 7th and 8th the word 'appurtenances' is introduced and repeated as subject to contribution." He laid down that these latter clauses were to be considered explanatory of the 1st clause proving that the obligation of that clause though briefly expressed in its own terms was intended to embrace whatever could be fairly considered as the "appurtenances" of the ship. It could not be considered that the following clauses introduce an inoperative word totally without meaning and they have no meaning unless they are understood to be virtually incorporated in the 1st clause and to derive operation from it. He held that

it could not apply to the cargo, therefore, its connection with the ship was merely transitory bearing a distinct character of its own, but that those accompaniments which are essential to a ship in its present occupation, not being cargo but totally different from it, though they are not direct constituents of the ship (if, indeed, they were they would not be appurtenances for the very nature of an appurtenance is that it is one thing belonging to another) yet if they are indispensable instruments without which the ship could not execute its mission and perform its functions might, in ordinary loose application, be included under the term "ship," being that which may be essential to it, as essential to it as any part of its own immediate machinery. After referring to various cases cited and remarking that the word "appurtenances," although introduced into the case as it had been, was no intruder but was the statutable word which in the latter clause of the statute reflected back upon the enacting clause and was fully entitled to share in the force of its obligation, his Lordship stated that the only question remaining was whether the word "appurtenances" is properly applicable to "fishing stores" on board a fishing vessel. He laid it down that it was a word of wider extent than "furniture" and might be properly applied to many things that could not be so described (with propriety at least) in a contract of insurance. It was not a simple matter to define what is and what is not an appurtenance of a ship. There are some things universally so, things which must be appurtenant to every ship *qua* ship, be its occupation what it may. In the instance of the "Dundee," he held she was not a merchant ship carrying out a cargo to be exchanged, she had a special character superadded by her special occupation and must have the machinery adapted to the catching of whales and to the dressing them in part on board the vessel; that the word "appurtenances" was not to be construed with a mere reference to the abstract naked idea of a ship, for

what would be an incumbrance to a ship employed in one way would be an indispensable equipment in another. There was also a further consideration, that if the stores in that particular case were not liable to contribution, the class of vessels called "whalers" would be favored in an unfair degree. In other cases of merchant ships, the wrong-doing vessel contributed not only her value but the amount of her freight; but in the case of whalers there is no freight and unless the fishing stores were made to contribute, there would be no fund for that purpose but the vessel herself, which would present a result apparently unequal and unjust, and he therefore pronounced the stores liable to contribution. The case was further contested and again came up before the Court of King's Bench on a special case agreed upon under a declaration in prohibition reported under the title of *Gale vs. Laurie* (1) and the same question was again raised as to the liability of the fishing stores to contribute and the judgment rendered by Lord Stowell was confirmed. Abbott, C. J. delivered judgment and referred to the fact that although in the 1st section of the Act in question the word "ship" only was used yet in the following sections the phrase "value of the ship and her appurtenances" occurs not less than ten times and that there could be no doubt that the first section of the Act on which the question arose was to be understood as if the words, "with all her appurtenances" were used therein, supposing those words would make any difference in the sense. Their object was to encourage persons to become owners of ships; their effect, however, was to abridge the right of recovering damages enjoyed by the subjects of this country at the common law and there is nothing to require a construction more favorable to the ship-owner than the plain meaning of the word imports, and that the fishing stores were not carried on board the ship as merchandize, but for the accomplishment of the objects

(1) 5 B. & C. 156.

of the voyage and the Court thought that whatever was on board the "Dundee" for the object of the voyage or adventure, in which she was engaged, belonging to the owners constituted a part of the ship and her appurtenances within the meaning of the Act. It was expressly stated that that judgment was given upon a particular ship engaged in the Greenland whale fishery and with reference to her particular state at the time, and that the Court did not deem it necessary to give any opinion upon particular cases of ships fitted out in a different manner for other fisheries, until some question arising out of such a case should come judicially before them.

After this case again, and some years later, appears that of *Langton vs. Horton*, (1) in which it was incidentally decided that a chronometer belonging to the owner which was on board at the time of the sale passed by a sale of the ship. The fact that this was a question in this case seems to denote that the decision in *Gale v. Laurie* (2), was not accepted as a decision for all cases as to what was meant by the term "ship," or "ship, her tackle, apparel and furniture," but only in reference to the particular statute to which it related and the particular mode in which the Greenland ship, in reference to it was employed by its owner, and it has been even decided in a similar case in Maine, *Richardson vs. Clark* (3), that a bill of sale of a ship in the absence of any agreement or usage to the contrary does not include the chronometer as an appurtenance of the ship.

Now, in the case which we have at present under consideration, there appears to me to be several grounds of distinction between it and the case of the "Dundee." In the first place the expressions in the Merchant Shipping Act, 1854, are, in section 103, "ship," or in section 52, "ship, her tackle, apparel and furniture," and there are no relative clauses which I can observe in the Act superadding to these words the word "appurtenances," as in

(1) 6 Jur. 911. S. C. 5 Beav. 9. (3) 5 B. & C. 156.

(2) 15 Maine 421-5.

the case of 53 Geo. III. cap. 159. I fail to deduce from any cases that I have found that the expression "ship" is more comprehensive than "ship, her tackle, apparel and furniture," although it may be equally comprehensive, I do not think it includes any more. The cases of *Kynter* (1), *Lano v. Neale* (2), and *Burchard v. Tapscott* (3), arising from bills of sale are not, in my opinion, decisions depending upon any usage or special contract between the parties determining the meaning of the expressions used, but they are decisions settling the legal meaning of words when used in legal instruments and apart from special objects of an Act, or other more extensive words of definition used in it which can be superadded to a simple expression, as in the Act 53 Geo. III, cap. 159. I am not aware that common words when used in an Act of Parliament have any different, or more or less extensive construction than when used in legal instruments. The cases upon the construction of the words "ship, her tackle, apparel and furniture," depend partly on questions of usage, but, so far as they go, show that there is no usage to make the terms so extensive as to embrace "fishing stores," and Lord Stowell, in the "Dundee" case, after adverting to the decision in the case of *Hoskins v. Pickersgill* (4), states that it was finally decided, and upon the best authority, that of the Court itself, though after much contradiction of evidence, and a verdict given by the jury the other way, that by the usage of "trade" the meaning of the word "furniture" did not include "fishing stores" in the construction applied to a contract of insurance, stated that he was not aware whether this would govern the construction of the same word occurring in an Act of Parliament, or in the phraseology of a Court, in which its meaning is, perhaps, more to be collected from its proper and genuine import than from a prevailing understanding controlling its proper meaning in a con-

(1) Leon. 46.

(2) 2 Starkie 105.

(3) 3 Duer. 863.

(4) 2 Marsh. Ins. 765; Park 97.

tract between two individuals, whose words were not to be carried beyond their own intentions in the contract. It was contended by the counsel for the plaintiff in this case that the fittings of a packet-ship and the guns of a privateer would be "appurtenances" of a ship. I am not aware that any case to such effect has ever been decided, but the same view was enunciated by Tindal, for the defendant in *Gale v. Laurie* (1). Not losing sight, however, of the fact that Tindal argued that they were "appurtenances," not "furniture," I see a vast difference between those cases as put and the present. The fittings of a packet-ship, such as her cabins and berths, are fastened on and built into the structure of the ship herself, and become, in effect, fixtures to and a part of her. In like manner, in the case of a privateer, an alteration has to be made in the structure of the ship for the use of the guns. Portholes must be cut, beds and slides made for the guns and fastened into the ship, and running bolts and screws driven into her to secure and work the guns. But the articles in the present case are not in any way attached to the ship, but can be put in and taken out of her without affecting her in any greater way than the putting in or taking out of cargo would. And the expression or word "appurtenances," used, as Abbott, C. J., said, not less than ten times in 53 Geo. III, cap. 159, and Lord Stowell declared must be taken to be virtually incorporated in the first clause, and Abbott, C. J., said the first clause must be understood as if it had been used therein, evidently had much weight with these judges in giving the extensive effect to the condemnation of the "Dundee" which they did. As already shewn, Lord Stowell stated his opinion that "appurtenances" was a word of wider extent than "furniture," and may properly be applied to many things that could not be so described (with propriety at least) in a contract of insurance, and the counsel in *Gale v. Laurie* (1), amongst other things, contended that the

(1) 5 B. & C. 156.

finding of the jury that a policy upon a ship, her tackle, apparel and furniture, would not cover the fishing stores and apparatus, could not affect that case, because the word "appurtenances" was larger than "furniture." Should, however, the articles comprised in the present action be held to be included under the word "furniture," there would hardly exist room for any difference between the comprehensive extent of the two expressions.

Again, there appears to me to be a great difference between the construction to be put upon the Act 53 Geo. III, cap. 159, relating to collisions, and this present Merchant Shipping Act, 1854. The former Act was in derogation of Common Law rights, for without it the party injured by collision would recover the whole of his loss, but by the Act he is limited to the value of ship and freight, therefore it must be construed liberally for the party injured, and curbed, rather than enlarged, by legal construction, but the latter is a special statute, and, therefore, to be strictly judged, and no intendment to be made except from matter appearing on the face of it. The object of the Act is to protect British shipping, but incidentally it prevents any one sailing a ship which he may have built or bought, unless it be duly registered, by declaring as forfeited any "ship, her tackle, apparel and furniture" which shall have an improper certificate of registry, or improperly use the British flag, and I fail to see anything in the Act, or object expressed, seeming to indicate that any fuller construction than an ordinary one be put upon it, and the more so as the effect might be, in some cases, as fishing gear and stores are susceptible, as in this case, of being owned apart from the ship, to involve three parties in punishment for the offence of the owner or master, a result at which the law would be very reluctant to arrive.

On these grounds, having given the Act in question, the whole case and the authorities cited, very close consideration, I have arrived at the conclusion that the

verdict in this case should be sustained, considering that in the ordinary interpretation of the term "ship," or "ship, her tackle, apparel, and furniture," the fishing stores, and other fishing boats and materials, (which I understand were on board in addition to the ordinary boats and materials of the ship) are not included, nor are they required, in my opinion, to be included by the objects, words or requirements of the "Merchant Shipping Act, 1854," and the sections on which the condemnation was founded.

I have not taken this course without much anxious care and thought and close consideration, not only on account of the public interest and private importance of the case, but because, of late, I ascertained with regret that my conclusions were at variance with those at which the other Judges of this Court had arrived, for whose learning and decisions I have always felt, and now entertain, the greatest deference, so that I cannot differ from them without the greatest hesitancy and reluctance.

DOE DEM JOHN A. McDONNELL V. JOHN A. MCISAAC.

*Ejectment—Will—Perpetuity—Determinable fee—Wrongdoer—
Doctrine of Cypres.*

In 1810 Captain J. McDonald devised the Donaldston estate, of which the *locus* was part, to W. & A. McDonald in trust, to permit his daughter, Flora, to enter into possession and have the sole management of it, and, during her life, to receive the rents and profits free from the control of any husband she might marry, and after her death he directed the trustees to permit the rents and profits to be laid out by guardians appointed by her or (failing such appointment) by her brother, in bringing up the eldest and younger children of her first marriage, until the eldest son by her first marriage should arrive at the age of thirty years, and then to convey the estate to such eldest son and his heirs, male. In 1821, after testator's death, Flora married plaintiff's father, and she and her husband continued in possession until his death in 1854, and she continued in possession until 1864, when she also died, intestate. The lessor of the plaintiff was their eldest son, and was over thirty years of age. There was no conveyance from the trustees to him. D. McIsaac, brother of defendant, had been in possession of the *locus* and paid rent to plaintiff's mother and to plaintiff, and then abandoned, when defendant entered. For defendant, it was contended that the legal estate was in the trustees, and no demise being laid in their name plaintiff must be non-suited. The plaintiff argued that the trustees took no estate under the demise, or if they took any it was only an estate in fee during Flora's life.

Held, (Peters, J.) That the trust in favor of the eldest son was void for perpetuity.

2. That the other trusts having been executed, and no further trust existing, the objects of the trust ceased, and, therefore, the trustees' estate also ceased, and the plaintiff, as one of the testator's heirs, had a right to recover.
3. That plaintiff was entitled by prior possession to maintain ejectment against the defendant, who was a wrongdoer.
4. That the doctrine of Cypres would probably apply, and if so Flora would take an equitable estate tail, and on her death plaintiff would become legal tenant in tail, and as such would be entitled to recover.

MOTION to set aside verdict for plaintiff and to enter a non-suit.

23th January, 1871.

Mr. Hodgson for plaintiff, shews cause.

Mr. McLeod, *contra*; Mr. C. Palmer follows.

2nd May, 1871.

PETERS J. This was an action of ejectment. The lessor of the plaintiff claims under the will of his maternal grandfather, Captain John McDonald. In 1810, the testator made his will, which, though a very prolix document, in effect devises the estate of Donaldston of which the *locus in quo* is part to William and Alexander McDonald (persons resident in Scotland,) and their heirs and assigns in trust to permit his daughter, Flora McDonald—the lessor of the plaintiff's mother—to enter into possession and have the exclusive and sole management of the property and thenceforth during her life to receive and take the rents and profits for her separate use free from the control of any husband she might marry, and after her death, that the said trustees should permit and suffer the rents and profits of the estate of Donaldston, and every part thereof to be employed and laid out by the guardians appointed by her or (failing such being appointed by her) by her brothers or the majority of them, in case of difference, residing on this Island, in bringing up and placing out to employment the eldest and the younger children of his said daughter. of her first marriage, even though she should have been oftener married, and that until the eldest son of her first marriage should have arrived at the age of thirty years, complete, and then when the eldest or the next surviving eldest son of her first marriage shall have arrived at the age of thirty years in trust, that the said William and Alexander McDonald and their heirs shall convey in fee, by a valid deed, the said estate of Donaldston to such eldest or next surviving son and his heirs male.

The testator died in———The lessor of the plaintiff's mother married the plaintiff's father in 1821, and she and

her husband continued in possession until 1854, when he died and the widow continued in possession until 1864, when she died intestate. The lessor of the plaintiff is the eldest son of the marriage, and attained the age of 30 years long before the commencement of this suit. No conveyance of the estate has been made to the lessor of the plaintiff by the trustees, nor in fact, did his mother or he ever hear from them, nor have they in any way ever interfered with the estate.

For the defendant, it was contended that the legal estate was in the trustees, and no demise being laid in their name the plaintiff must be non-suited.

The plaintiff argues that the trustees took no estate under the devise, or that if they took anything, it was only an estate in fee during the life of Flora McDonald.

The first question, therefore, is, what estate did the trustees take? The limitation of the estate is not to the use of the trustees, their heirs and assigns, which would give them the fee on the ground that a use cannot be limited upon a use, *Doe dem Booth v Field*, (1) but only to the trustees, their heirs and assigns; and in the previous part of the clause devising to the trustees, the testator expressly declares that he gives it to them in order to prevent the contingent uses and estates thereafter limited from being defeated, and then after describing the estates intended to be devised for the benefit of Flora, as well as for the benefit of his other children, he again declares that the trustees are to hold the said several sub-divisions and estates under the trustees, their heirs and assigns for ever upon trust, nevertheless, and under and subject to the powers, uses provisionary, and limitations thereafter expressed and declared of and concerning the same.

Where lands are devised to a trustee without words of limitation of the estate, it depends upon the construction of the will, whether he is a mere conduit pipe for passing

(1) 2 B. & Ad. 564.

the legal estate, or whether he takes in fee. If no duty or trust is cast on him he takes nothing, if a duty or trust is cast on him the quantity and duration of his estate depend on the trust or duty imposed. Whether the trust is "active" or "passive" is sometimes put as the test, but this (taking the words "active" and "passive" in their ordinary and popular sense) seems not quite accurate; for an authority which is to remain latent until danger to the interest to be protected invokes its exercise, is an "active" trust. Thus it is laid down, a devise to A and his heirs, simply in trust, to permit B to receive the rents, &c., will, under the Statute of Uses, vest the legal estate in B, but if any agency or control is to be exercised, or duty performed by A, as to apply the rents to a person's maintenance, or in making repairs, or to hold for the separate use of a feme covert or to permit a feme covert to receive the rents for her separate use, A will take the legal estate (1). There can be no doubt that under the trusts of this will a freehold estate vested in the trustees and that (if the trust in favor of the eldest son is valid) the fee simple vested in and must remain in them until the conveyance to him was executed, as they could not convey unless they had it. But the trust in favor of the eldest son is clearly void as it postpones the vesting of his estate for an absolute period of more than 21 years after a life in being.

The doctrine (always so difficult to apply) of determinable fees, or rather that no greater quantity of legal estate should be taken by trustees under an indefinite devise than is sufficient for the purposes of the trust, has been abolished by the 30th and 31st sections of the English Act, 1 Vic, cap. 26, which has been re-enacted here, but as this will was made before the Act came into operation the next question which presents itself must be governed by the old law. That question is, whether (the devise in favor of the eldest son being void) the estate of the trustees did not determine on the death of Flora

(1) Whar. L. Lex. Tit. "Trust."

McDonald, the plaintiff's mother? or, at most, at the period of the lessor of the plaintiff attaining thirty years, when the trusts for maintenance of children ceased? In *Doe dem Player v. Nicholls* (1), Bailey, J., says, "it may be laid down as a general rule that when an estate is devised to trustees for a particular purpose, the legal estate is vested in them as long as the execution of the trusts requires it, and no longer, and, therefore, as soon as the trusts are satisfied it will vest in the persons beneficially entitled to it." The rule, as thus laid down, would seem to include all cases where it had become impossible to do the act the trust was raised to perform, whether the impossibility arose from collateral events, or from causes appearing in or from defects inherent in the will itself. But in *Doe dem Shelley v. Edlin* (2), the rule was qualified so as to confine it to cases where, from the words of the instrument, or the apparent intention of the testator, the trustees originally took only such quantity of interest as the purposes of the trust required, and its application to a case of a fee simple once effectually raised was denied. Lord Denman, in giving judgment, after quoting the rule as laid down by Bailey, J. and Holroyd, J., in *Doe dem Shelley v. Edlin* (2), says, "if the rule above mentioned, as laid down by these judges, be confined so as to say that the trustees originally take only that quantity of interest which the purposes of the trust require, so far as is expressed by the words of the instrument itself, or by the apparent intention of the maker of the instrument, consistent with the language of it, then I admit the rule to be correct; but if it is meant to apply to all cases in general, where the trusts are no longer capable of being carried into effect, but yet the instrument, by the legal construction of it, already gave an estate which might continue for a longer period than that during which the objects of the trust had an actual existence, then that, in my mind, will admit of a different

(1) 1 B. & C. 336.

(2) 4 Ad. & El. 582.

construction. I admit that for a great number of years past the Courts have held that trustees take that quantity of interest which the purposes of the trust require, and the question is not whether the maker of the instrument had used words of limitation, or expressions adequate to convey the estate of inheritance, but whether the exigencies of the trust require a fee, or can be satisfied by a less estate." In *Doe dem Codogan v. Ewart* (1), the same Court adhere to the rule thus laid down.

Now what are the trusts here? The first is to protect the daughter's separate interest during coverture. That would give the trustees a freehold during her life. The next is to permit the guardians, after her decease, to receive the rents and profits for the maintenance and education of the children, until the eldest son attains the age of thirty years. That would give the trustees an estate for years determinable on the eldest son attaining that age. The remaining trust is to convey to the eldest son. In *Doe dem Shelley v. Edlin* (2), above referred to, the devise was to a trustee in fee, in trust to receive and apply the proceeds to the use of S. for her life, and after her decease to convey, as she should by deed or will appoint. There was no devise over, S. died intestate during the life of the testator without having made an appointment. It was held that the devise being legal did not lapse by the death of S., but, notwithstanding it had thus become impossible to carry the trust into effect, that the legal estate continued in the trustee. This decision might, at first sight, appear to govern this case, but it is clearly distinguishable. There the fee simple was required to perform a trust legally raised by the will, and the fee simple once having a valid subject matter to operate on necessarily at first vested in the trustees. Here the intended trust, from an inherent vice, never attained a legal existence, and, therefore, a fee simple in the trustees was not required, there never being, for one

(1) 7 Ad. & El. 636.

(2) 4 Ad. & El. 582.

instant, a subject matter on which it could operate, and, consequently, it never could have vested in them at all. Besides, the testator's plain declaration is, that he gives the estate to the trustees to prevent the trusts thereafter limited from being defeated. Now, whatever he might have intended to do, or thought he had done, a trust never really created could be in no danger of being defeated, and no estate in a trustee could be necessary to preserve it. The two first trusts to protect which (as already observed) the trustees originally took only determinable estates, commensurate to the duration of the trusts having been long since executed and no further trust having ever existed, I think the case falls within the rule as explained in *Doe dem Shelley v. Edlin*, (1) that the object ceasing, the estate of the trustees ceases also, and the lessor of the plaintiff being one of the heirs of the testator, has a right to recover in this action.

On another ground, the lessor of the plaintiff was entitled to recover. Prior possession is sufficient to maintain ejectment against a wrong doer. Here Donald McIsaac, the defendant's brother was in possession, and paid rent to the lessor of the plaintiff's mother and to him after her death, thus making himself his tenant; then he abandoned it, whereupon the land in contemplation of law continued in the possession of the plaintiff, when the defendant entered. What right had he to take possession? Who authorized him to go there? He does not say he came in under his brother Donald. That would have been an acknowledgment of the plaintiff's right to turn him out. He is a mere wrong doer showing no title good or colorable, and that being the case, he cannot as he attempts to do, set up the old one hundred years outstanding lease to third persons against the prior possession of the plaintiff. To entitle him to do so, he was bound to show some title in himself under the lessees of the one hundred years term, or some *bona fide* colorable title

(1) 4 Ad. & El. 582.

under which he took possession. But he did nothing of the kind, nor did he offer to call himself to prove by his own evidence how he came there.

There is yet another ground on which I am inclined to think the lessor of the plaintiff is entitled to recover, which is, that the *cypres* doctrine is probably applicable to the construction of this will, and if so the lessor of the plaintiff's mother would take an equitable estate tail and he would become legal tenant in tail on her decease subject to the charge for maintenance of children. But the will is a most extraordinary document. It appears as if it had originally been drafted by a not unskilful hand and that the testator after each clause had interpolated his own ideas to explain or enforce what had been before correctly expressed to effectuate his intentions, and the consequence is that very often he destroys provisions which he fancied he was making more binding. But the labour of analyzing fifteen or sixteen closely written pages, one half of which is mere verbose nonsense, but which nevertheless may exercise some controlling power over more intelligible provisions, is a task which I have declined to undertake, the points on which I have already expressed an opinion being sufficient to decide the case, and the others under the events which have happened not being of much importance to any one.

I think the rule for a nonsuit must be discharged.

DANIEL DINN, APPELLANT V. THE QUEEN, RESPONDENT.

(CARVELL V. THE CITY OF CHARLOTTETOWN.)

Appeal from City Court—Charlottetown Incorporation Act—General Trespass Act, 12 Vic. cap. 16, sec. 14—Nuisance—Obstructing the continuations of the streets on the ice—Variances.

The appellant had been fined £1 in the City Court for placing obstructions near Pownal wharf on such part of the ice as formed a public street and highway. The fine was imposed under the provisions of a City by-law to prevent obstructions being placed on the continuations of streets which form public openings to the river, and which by-law was passed under a provision in the Act of Incorporation, empowering the Corporation to pass by-laws "to abate and cause to be removed all public nuisances." The legality of the by-law being disputed respondent also relied on the General Trespass Act (12 Vic., cap. 16, sec. 14) which imposes a penalty of £5 on all persons doing "spoil or damage" to any public way, etc. The evidence shewed the obstruction in this case to be off the line of the street, and the question to be considered was whether the public had a way by prescription or otherwise on the ice over appellant's land in winter and of navigation in summer. The summons alleged that defendant placed an "obstruction on the public thoroughfare leading from Pownal Street to Hillsborough River, the same being a public street of Charlottetown." The conviction was for having placed the obstruction "upon the ice of Hillsborough River within one hundred feet of Pownal wharf, and on such part of said ice as forms a public street of the City, and a public highway from the River into, to and along the continuation of Pownal Street, etc., and did, thereby, greatly impede and obstruct the said public highway." Appellant contended that there was a material variance between the summons and conviction, and that the latter must be quashed on that ground. He also contended that the City Court and this Court on Appeal had no jurisdiction to decide the matters in dispute.

Held, (Hensley, J.) That the question being one of public and private rights and of title, was for a jury to decide, and was not within the jurisdiction of magistrates under the Trespass Act, nor of the City Court under the Act of Incorporation.

2. That there was a material variance between the summons and conviction, and on that ground the conviction could not be supported.

APPEAL from the City Court, heard 3rd and 4th May, 1871.

Mr. C. Palmer, Mr. McLeod, Mr. Hodgson, and Mr. Davies, for appellant.

The Attorney-General and Longworth, Q. C., for respondent.

13th May, 1871.

The judgment of the Court was delivered by Mr. Justice Hensley, as follows :—

HENSLEY J. This is an appeal from a judgment rendered in March last in the Police Court of the City of Charlottetown, in a suit entitled, according to the minute filed in this Court. “The Queen on the prosecution of *Thomas Flynn v. Daniel Dinn*.” The judgment below was against Daniel Dinn for the sum of twenty shillings and costs. The summons alleges that the defendant “did, on or about Thursday, the 2nd day of March, instant, erect and place a certain nuisance and obstruction on the public thoroughfare, leading from Pownal Street to Hillsborough River, the same being a public street of Charlottetown.”

The conviction on that summons was, for having placed and erected “to the height of six feet, certain trees and brushwood and logs of wood along and upon the ice of Hillsborough River, near and within one hundred feet of Pownal wharf, and on such part of the said ice as forms a public street of the City of Charlottetown, and a public highway leading from Hillsborough River, aforesaid, into and to and along the continuation of Pownal Street, and thence unto and into said Pownal Street, and thereby did greatly impede and obstruct the said public highway.”

To support this summons and conviction, the counsel for the respondent relied in the first place upon a by-law of the city, passed in 1856, as follows :—

“The surveyor and police constables, under the direction of the Mayor or Presiding Councillor, shall

prevent persons placing vessels, boats, timber, scantling, or other articles, in the continuations of streets which form public openings to the river, without a license ; and any persons guilty of placing any such nuisance or impediments in such openings shall subject themselves to a fine not exceeding twenty shillings and to a like sum for every day they continue such nuisance or impediment." This was passed under the provisions of the 18th Vic., cap. 34, sect. 35, sub-sect. 5, which, amongst other things, empowers the city corporation to pass by-laws "to abate and cause to be removed all public nuisances."

The legality of the by-law being disputed, respondent's counsel stated that he also relied on the General Trespass Act, 12 Vic., cap. 16, section 14, which imposes a penalty of £5 upon a party doing "damage or spoil" to "any public way, &c." As the terms of the by-law are limited to obstructions placed "in the continuations of the street, which form public openings to the river," it was necessary, in my judgment to prove that the obstruction was built on the line of Pownal Street, properly so speaking, that is, (supposing the street as contended for by the respondent, really to run into the river, under the water to the channel on the line of the same street) as protracted on the same course on both sides of the river. No other road or right-of-way gained by use, dedication, or prescription, comes under the words or the intention of that by-law. I put entirely aside for the present, the many points raised at the hearing as to the force of the by-law, whether it was legal in its inception, legally passed, or really in operation, or whether its passing was legally proved ; and I now refer to the evidence alone on the point, as to whether the obstruction complained of as erected, on the 2nd March, was really on "the line or continuation of Pownal Street," or at its "opening to the river."

(The Judge here read the evidence on this point, and was of opinion that it was conclusively proved, that the

obstruction was on the 2nd March, to the westward of the line of Pownal Street.)

The question being therefore, in my opinion, settled that the breastwork was not an encroachment on the line proper of Pownal Street, it becomes necessary to consider how the matter stands with respect to the other branches of the case, and to inquire whether the public had a way by use, permission or dedication as regards a road over the ice in winter, crossing over the soil of appellant's land, and thence up the bank at the west side of Pownal wharf, and in summer of navigation generally over it, which the breastwork unlawfully impeded, or on which it unlawfully encroached.

There can be no doubt but that there is a space of eight or ten feet on the bank, between Pownal wharf and what is called "Purdie's Breastwork," which the public use, and which the appellant in this case does not deny they have a right to use; and the dispute does not arise there. It appears that Pownal Street wharf was not built as a true continuation of the line of Pownal Street, but ran at an angle inclining considerably to the westward, towards the line of the lot which then was known as the "Ordnance Lot," but now is the lot claimed by Mr. Carvell, and thus the extremity of Pownal wharf approaches very close to the line of the "Ordnance Lot." The inclination of Pownal wharf to the westward has, since its construction, been further increased by its having shifted in places in that direction; and thus by degrees, it is alleged, the public way has been obstructed by the action of the public themselves.

1st. By constructing the wharf at an angle to Pownal Street, and thus curtailing the space between it and the Ordnance Lot.

2nd. By allowing it, when shifted, to remain so, thus still further narrowing the space.

The respondent, however, offered evidence to prove that, irrespective of all this, the public had gained a way

over this Ordnance Lot, or a part of it, by use or dedication, or in some other way ; and, on the part of the appellant, it was contended that no other than a merely permissive way at times was given, and that only casually and interruptedly ; and that Purdies and others in possession from time to time had exercised ownership, and done acts quite inconsistent with the existence of any such public right as that now claimed.

This is evidently a *bona fide* case of dispute and collision between public and private rights, a question of title, and, therefore, not one which comes within the jurisdiction of magistrates under the Trespass Act to try, but is a case for a jury only. I am clearly of opinion that their jurisdiction is limited to plain evident cases of nuisance (so-called) or obstructions to evident and clearly marked and defined public highways, and not to any highway or other way about which any such dispute as the present exists as to its really being a highway, or way, or not, and its extents and boundaries.

The question, whether a way is a public one, where the evidence is so conflicting as the present, is for a jury to decide.

In most cases where there is a dispute of this kind, it involves, as this case does, difficult questions of law and conflicts of evidence, which it would be quite unfit for a magistrate or a single judge, without the assistance of a jury, to determine ; and this in similar cases has been over and over again so decided.

Moreover, in a case like the present, where the right is claimed of way over the river, these shores being frequently open till erections are made on them by the Crown or grantees of the soil, it is doubtful whether any length of use, except by marked and well defined limits, acts calling the eye to the fact that a road was claimed, would have any operation to take away the rights of the owner of the soil of the shore to use it for other legal purposes inconsistent with the existence of a road.

The doctrine in this respect was very fully laid down in the case of *Blundell v. Catteral* (1), referred to on the hearing especially as regards the permissive use and its effect. That case was also referred to in the very voluminous judgment of this Court in the case of *The Queen v. Lord* (2); which was an indictment for a nuisance, tried some years ago in Prince County, and the law was then thus laid down by Mr. Justice Peters, in delivering the judgment of the Court:—"Science and the ingenuity of man are constantly offering new inventions for the benefit of trades, manufactures, agriculture and commerce; many of these can only become practically useful when located on the sea shore. But if the use of the shore by the public as a way be not merely permissive but of common right, by what authority could a Marine Railway, which must extend below low water mark, and, therefore, leave no passage, be erected or maintained. Then if it were a common nuisance any individual might cut it down with impunity. But the right exercised under a permissive use justifies no such outrage, tolerates no such monopoly, but adjusts itself to suit the peculiar cases of different localities, and the ever-varying requirements of public convenience."

Nor is the difficulty in this case lessened by the fact that this way is claimed as over the ice by use, which is one certainly not susceptible of being governed by such rules as are applicable to ways on land.

The public undoubtedly have a right to travel on a public river on the ice, and to do so in such well marked and beaten ways as are most convenient to them, and to land at public landing places. But as the Chief Justice Weston declared in the case of *Rench v. Camp* decided in the State of Maine, "they are not proper subjects for the application of Statute Laws, provided for the location of roads and highways; nor are they susceptible of being governed by the rules and principles by which easements

(1) 5 B. & Ald. 268.

(2) Ante p. 245.

of this kind may be otherwise acquired on land." In this view of the case, also, I do not consider they come within the objects of the 14th section of the General Trespass Act, 12 Vic., cap. 16, or that the penalty inflicted by it on any one doing damage or spoil to a public way is applicable to such a case as the present.

Again the owner of the shore of a navigable river has a right to erect embankments, to re-claim the land from the water, and to erect wharves and stores upon it, subject to the risk of its being found a nuisance by a jury. Does the fact that a river is frozen over in winter take away this right or lessen it in any way? I think not.

Nuisance or no nuisance in such a case, is a question which a jury alone can decide, and it cannot be held that it comes within the power of a magistrate sitting under the Trespass Act, or Act of Incorporation, or that the Act of Incorporation conferred, or intended to confer the power on the corporation by passing a by-law imposing a penalty to take into their own hands and decision—a question involving so many difficult matters of law and fact, and adjudging summarily that to be a nuisance which a jury might declare to be a public benefit. Such a course would be exceedingly dangerous and unconstitutional, especially when judged of by local boards, between whom, from local circumstances, and the defendant, warmth of feeling might and probably would in most cases exist. I need not go over the cases of *Rex v. Russel*, (1) *Rex v. Ward*, (2) or other cases on the subject of the directions which a judge should give to a jury in determining the question of nuisance or no nuisance, or whether a balance should be struck between the benefits and damages done by an erection alleged to be a nuisance, because the views I entertain on the subject of jurisdiction, render it unnecessary for me to do so, but I will shortly refer to a judgment given by Judge Halliburton in Nova Scotia, in the case of *Collins v.*

(1) 6 B. & C. 566.

(2) 4 Ad. & El. 384.

Barss, in which, in referring to cases like the present, and in reference to rights to build wharves, docks and stores, thereon, he thus lays down the law :—“Property of this nature on the sea-shore is as much protected by the law as inland property. If it is so insulated as to interfere with public rights by injuriously narrowing the point or otherwise proving detrimental, it can be indicted and abated as a nuisance. But until a jury decide that it is a nuisance, no individual can disturb the possessor in the enjoyment of it without having a right (that is some right to the land itself) to do so. All bays, creeks, runs of the sea and navigable rivers are public highways, open and common to all subjects. But they differ from highways on land in one essential, particularly that the Crown can make no grant of any part of a highway to a subject. But for the purposes of commerce (for the convenience of which wharves are indispensable) the Crown can grant portions of the shore and of the land adjoining it under water to individuals.”

The occupant of land on the sea-shore has as much right to use the waters on that shore for the purpose of ingress and egress, as the occupant of property adjoining a highway has to use it for such purposes. Could a grant be made to anyone of the land covered by water in front of him, he would be deprived of the right, but if a grant be made to himself, and he erects wharves and stores thereon, his right is preserved and the public are more benefited than injured by such erections. Should that not be the case I have already shown in what manner injury is to be removed.” That is by an indictment and verdict of a jury relating it a nuisance upon which abatement follows.

I therefore, consider that the proof given establishes that the breastwork does not encroach on the line of Pownal Street, and that there is no jurisdiction in the Magistrates or this Court of Appeal to try the points raised respecting it in any other position more particularly

as the facts are so contradictory, and the dispute genuine and *bona fide* between the parties.

In this view of the case I have not found it necessary to discuss at length the many other technical points raised in the case, but I may state that the variance between the summons and conviction is so great that I don't think it could be supported on that ground. The summons or complaint is from Pownal Street to Hillsborough River which would begin at ordinary high-water mark, whereas, the conviction is for an offence strictly stated to be on the ice of Hillsborough River, one hundred feet off Pownal wharf, whether to east, or west, or south of it, it does not specify.

I am also inclined to think that the action, if under the by-law, was wrongly brought, and that as the by-law did not point out in whose name it should be recoverable, it could only be sued for in the name of the Corporation. But my present judgment is not based at all upon either side of these two latter grounds.

A great deal of warm feeling evidently exists between the parties in this matter, as was evinced more than once by declarations of counsel on the subject, many of which had better have been left unsaid; and grave charges of corruption and ill-conduct on the part of the corporation of Charlottetown in connection with it were made, which I was sorry to hear. I was glad, however, that no material evidence was given of this, and that I am not called upon to pronounce any opinion on the conduct of the gentlemen who tried the original case from which this is an appeal; and who, being gentlemen of standing in the community to whom are entrusted very arduous and important duties, and who being the guardians of the civic rights of the inhabitants of Charlottetown, and to some extent of the public generally, are, in the due and proper discharge of those duties, entitled to respect and consideration.

The judgment given below in this case is, therefore, reversed.

JAMES DUNCAN & Co. v. THE BRITISH AMERICA
INSURANCE COMPANY.

*Marine Insurance—Condition to sail not later than 15th December
—Underwriters not liable if vessel sails on 17th December.
though lost outside prohibited waters.*

By a policy dated 4th April. defendants insured plaintiff's ship for ten months, with liberty to sail from Charlottetown not later than 15th December. Except this liberty to sail from Charlottetown not later than 15th December, the vessel was not allowed, under the policy, to be in the Gulf of St. Lawrence after 15th November without payment of additional premium and leave first obtained, which was not done. The ship did not sail from Charlottetown until 17th December, but passed safely out of the Gulf of St. Lawrence, and was subsequently lost during the voyage on the English coast.

Held. (Peters, J.) That the contract was to insure the vessel on condition that she sailed from Charlottetown not later than 15th December, that time was of the essence of the contract and that the condition was not performed, and, therefore, the plaintiffs could not recover.

SPECIAL case on marine policy.

15th July, 1871.

Mr. Hodgson for plaintiffs; Mr. C. Palmer follows.

Haviland, Q. C., *contra*.

The Attorney-General and Mr. Davies follow.

Mr. McLeod replies.

Cur. ad. vult.

31st October, 1871.

PETERS J. The facts set forth in this special case are as follows: by a policy partly printed and partly written dated the 4th of April, 1870, the defendant insured the plaintiff's ship, the "New Dominion," the adventure to begin at and from "Liverpool G. B. for the space of ten calendar months from the date of sailing with liberty to sail from Charlottetown not later than the 15th of December.

The last clause of the printed portion of the policy is as follows: "not allowed under this policy to enter the Gulf

of St. Lawrence before the 15th of April, or to be in the said Gulf after the 15th day of November, nor to proceed to Newfoundland after 1st of December, or before the 15th of March without payment of additional premium and leave first obtained, war risks and sealing voyages excepted. N. B.—The Gulf of St. Lawrence to include also the Straits of Northumberland, shall be defined to be inwards from a line drawn from Cape North to Cape Race, and a line drawn from Sand Point at the Strait of Canso to Cape North." P. E. Island lies within the Gulf of St. Lawrence. The ship did not sail from Charlottetown until the 17th of December, passed safely out of the Gulf of St. Lawrence, and was subsequently lost while proceeding on her voyage from Charlottetown, on the coast of Great Britain.

For the defence, it is contended that the written clause to sail from Charlottetown not later than the 15th of December constituted a condition or warranty not to sail after that date, which being broken, the plaintiff cannot recover.

For the plaintiff, it is urged that this being a time policy, the printed clause "not to be in the Gulf after the 15th of November," was not a warranty, but only an exception which would suspend the risk during any period she might be in the Gulf of St. Lawrence after that date, leaving it to attach again, as soon as she got safely out of it, and the writing was only intended (in the event of the vessel being in Charlottetown) to exclude the time fixed by the printed clause to the 15th of December with an addition of such time as according to the ordinary course of navigation would be necessary to get out of the Gulf after leaving Charlottetown.

A good deal of argument also took place as to whether the printed clause or the writing was to have the greater effect. The general rule is that if the whole contract can be construed together so that the written words and the printed make an intelligible contract, this construction

should be adopted, but if what is written conflicts with what is printed, the writing controls what is printed; it being, as Mr. Greenleaf observes, the immediate language and terms selected by the parties themselves for the expression of their meaning, while the printed formula is more general in its nature, applying equally to their case and that of all other contracting parties on similar subjects.

It is evident that, to adopt the plaintiff's construction, great liberty must be taken with the language of the contract; not only must the time be extended, but a new clause must be added, *i. e.* "the addition of such reasonable time after the 15th of December as according to the usual course of navigation would be necessary to get out of the Gulf." But there seems to me no occasion for giving more effect to the written than to the printed clause, nor for attempting to add or to alter the language of either, as full effect may with perfect consistency be given to each. The printed form contains the conditions and regulations adapted to general cases, applying to ports high up the Gulf of St. Lawrence where after the 15th of November the dangers of navigation are great, as well as to those lower down, where until a later period, they are less. Looking at this, and contemplating the possibility of the vessel being in Charlottetown, the written stipulation engrafts on the contract as printed, a special provision, applicable to the risk from this particular port, *viz.*, for the benefit of the assured, a privilege, or liberty, which the general terms of the printed policy would not give, but expressly excluded, of sailing from Charlottetown in and through the Gulf of St. Lawrence not later than the 15th of December; thus simply—in this one event—excepting the vessel from the operation of the subsequent general, printed clause, which prevents her entering the Gulf of St. Lawrence before the 15th of April, or being in it after the 15th of November, but leaving her in all other respects subject to

its operation. This construction gives every clause of the policy an intelligible meaning, as the ship might then leave Charlottetown on the 15th of December, the sea risk attaching the moment she got out of the harbor, and the printed clause continuing in full force, would prevent her sailing from any other port in the Gulf so as to be in it after the 15th of November, or from entering it again before the termination of the policy, whilst if she remained to winter in Charlottetown, she would be covered by the policy against the harbor risks until its termination in February.

The liberty to leave Charlottetown "not later than the 15th of December" is given in the most clear and un-mistakeable language, and as she could not leave it without passing through the Gulf, it seems evident that the intention of the parties must have been in accordance with this construction, *i. e.*, that in this one contingency, of the vessel happening to be in Charlottetown the printed clause was not to apply to her at all, provided she sailed from thence by the 15th of December, but with respect to all other ports, and in all other events, it should continue binding. The policy thus construed is what is called a mixed policy, partaking of the nature of both a time and a voyage policy, of the nature of a time policy in its general scope and effect, that is if after sailing from Liverpool she does not enter the Gulf before the 15th of April, or be in it after the 15th of November, etc., it continues strictly a time policy of the nature of a voyage policy, particularly in reference to this case, when the ship is at Charlottetown in a position to enable the insured to avail himself of the liberty granted of sailing from thence, and he desires to do so because it then becomes essentially connected with the commencement of that voyage, and must, therefore, as regards such voyage from Charlottetown, be governed by the established principles of law applicable to voyage policies, and subject, therefore, to all the consequences attendant on a non

departure under a voyage policy within the time limited by the policy.

Then do the words of the written liberty in this policy constitute a condition or warranty? I am clearly of opinion that they do.

In *Pettigrew v. Pringle* (1), the rule to which the policy referred, provided that the vessel should not sail after the 1st of September for certain ports in British North America; there were two *termini* to the voyage, but a very wide range of ports at both ends; it was a time policy from the 20th of February, 1828, to the 20th of February, 1829 the vessel might have run under it as a pure time policy for six months, when, on the 29th of August, an intention to sail for British North America called the rule as to the period of departure for British North America into operation, and converted it *quoad* the intended voyage into a voyage policy. It is not disputed that the provision not to sail after the 1st of September was a warranty.

Collidge v. Hartz (2), was a time policy for a year. Among several stipulations as to time of sailing, one was not to sail for any port in the Baltic between certain dates in December and February, there was no *terminus a quo*, but only *ad quem*, respecting this particular prohibition. The vessel had run under the policy for nearly a year; when sailing for a Baltic port at the prohibited time she was lost, the plea did not aver that the loss was within the prohibited period. It was held a warranty and not an exception, and, therefore, such averment was unnecessary. The vessel might have been in any part of the world, but if she sailed for the prohibited belts the warranty would have been broken. That case was the converse of the present, in this, that here the prohibition is from a certain port, but where is the difference in principle? Besides, the 9th rule also contained a prohibition as to sailing from the Baltic port between certain

(1) 3 B. & Ad 514.

(2) 6 Ex. 205.

periods, but fixing no *termini ad quem*. Had she violated the rule by sailing after the prohibited date from this place in the Baltic it would equally have vitiated the policy. Now this is exactly the case here, a time policy, but not to sail from Charlottetown after the 15th of December.

Many of the cases decided on charter parties where the contention was whether the time of sailing formed a condition precedent or not are applicable to the present case. In *Ollive v. Booker* (1), an action for not loading a vessel in pursuance of the term of a charter party, by which it was agreed between plaintiff, "original charterer of the good ship "Dove," now at sea, having sailed three weeks ago," and defendant. It was held that the time at which the vessel sailed was material, and that the statement in the charter party amounted to a warranty. Parke B. says, "in the construction of agreements, as in the case of contracts under seal, we should endeavor to discover the intention of the parties. Here it is stated that the vessel was now at sea, having sailed three weeks ago; and if time is the essence of the contract, no doubt it is a warranty and not a representation. Such, also, is the case of policies of insurance. It appears to me that it is a warranty, and not a representation, that the vessel had sailed three weeks. It is, therefore, a condition precedent. This being a condition precedent, and not performed, the defendant was not bound to load the vessel.

I entirely agree with the reasoning of the Chief Justice in *Glaholm v. Hays* (2). *Glaholm v. Hays* (2) was *assumpsit* on a charter. The words of the charter were, the vessel to sail from England on or before the 4th of July then next. It was held that the sailing on or before the 4th of July was a condition precedent. Per Tindal, C. J., "the very words 'to sail on or before a given day,'

(1) 1 Exch. 416.

(2) 2 Man & Gr. 257; S. C. 2'
Scott N. R. 471.

do by common usage, import the same as the words conditioned to sail,' or 'warranted to sail on or before such a day;' and, undoubtedly, if the wording of a common bought and sold note for a cargo of corn, or any other goods, were found the words 'to be delivered on or before such a day' they would be held to amount to a condition; and the purchaser would not be bound to accept the cargo if not ready for delivery by the day appointed. And looking at the subject matter of the contract, without regarding the precise words, we think that construing the words as a condition precedent, will carry into effect the intention of the parties, with more certainty than holding them to be a mere matter of contract only, and merely the ground of an action for damages." And again, "upon the whole, therefore, we think the intention of the parties to this contract sufficiently appears to have been to insure the ship's sailing at latest by the 4th of July, and that the only mode of effecting this is by holding the clause in question to form a condition precedent; which we consider it to have been."

In *Croockewit v. Fletcher* (1), the words were, to sail from Liverpool on or before the 15th of March next, the exception was as follows, "restrictions of princes and dangers of wreck, act of God, etc., throughout this charter-party always excepted." It was held that notwithstanding the words "throughout this charter-party," the sailing of the ship on the 15th of March was a condition precedent to the obligation of the defendant to load the ship. In giving judgment the Court says. "if the word 'throughout' had not been in the charter-party, the case of *Glaholm v. Hays* (2) is a direct authority expressly in point, that the stipulation for the sailing on the 12th of March was a condition precedent, and this case has been acted upon in two cases in this Court;

(1) 1 H. & N. 893.

(2) 2 Man. & Gr. 257.

Ollive v. Booker (1), and *Oliver v. Fielden* (2). If we had thought this decision not correct, we should nevertheless have considered ourselves bound by it; but we entirely concur in it, and are of opinion that it was rightly decided, and that any other construction of the charter-party would lead to most mischievous consequences. All mercantile contracts ought to be construed according to their plain meaning to men of sense and understanding, and not according to forced and refined constructions which are intelligible only to lawyers, and scarcely to them."

The reasoning of the judges in those and many other cases applies with equal force to similar cases on policies of insurance. Every mercantile man understands the words "to sail by a certain day," or "not later than a certain day," to be an express agreement that such stipulation shall be performed, and to throw doubt on a rule so well understood would be attended with most mischievous consequences, as it would render the exact limits of an underwriter's liability, as well as the assured's rights, in many cases doubtful, and thus introduce uncertainty on a point of mercantile law where it is most important that none should exist.

By the written provision here, as in the case of *Baines v. Holland* (3), the sailing from Charlottetown is made as it were a new starting point for the further continuance of the risk, and must necessarily be governed by the same rule that would have prevailed supposing the policy instead of providing for the beginning of the adventure "at and from Liverpool, G. B., for the space of ten calendar months from the date of sailing," had these words added, "warranted to sail," or "provided she sailed," or "the vessel to sail before the 10th day of April," or any other date, or if the words we are now considering had been added, and the policy had read thus,

(1) 1 Exch. 416.

(2) 4 Exch. 135.

(3) 10 Exch. 801.

“for ten calendar months from the date of sailing, with liberty to sail from Liverpool not later than the 15th of April,” and she had sailed after the day named, is it not quite clear that in any such case the policy would not have attached? For the simple reason that by sailing after the time limited the risk was altered from that which was intended by all the parties when the policy was effected. So in this case the sailing from Charlottetown not later than the 15th of December is the basis of this part of the contract, and time is of the essence of the contract. By sailing after the 15th of December the assured substituted another risk for the only one which, if the vessel was at Charlottetown after the time limited in the printed clause and sailed therefrom, was insured against. It is quite obvious that had the vessel not sailed under the liberty granted, or in defiance of it, she must have remained at Charlottetown until long after the risk expired by effluxion of time, and so the insurers would practically have been liable only for harbor risks. But the increase or diminution of the risk is wholly immaterial, the true question is, has the risk been varied, has the condition been strictly and literally performed? “The warranty (says Mr. Arnold, 553) in a contract of insurance, is a condition or a contingency, and unless that is performed there is no contract. Inquiry into the materiality or immateriality to the risk of the thing warranted is entirely precluded, and so are all questions as to substantial compliance. By a breach of warranty, therefore, although the loss may not have been in the remotest degree connected with it, the underwriter is none the less discharged on that account from all liability. A ship warranted to sail with convoy had, in fact, sailed without it and went down in a storm, the underwriter was nevertheless held not liable for the loss.”

A ship was insured on a slaving voyage at and from Africa to her port or ports of discharge in the West Indies, and a memorandum was inserted in the margin of

the policy that the ship had "sailed from Liverpool with fourteen six pounder swivels, small arms, and fifty hands or upwards, copper sheathed," the ship had actually sailed from Liverpool with only forty-six men, but within twelve hours afterwards she had taken on board at Beaumaris six additional hands. The Court unanimously held that it was a breach of an express warranty for the ship to sail from Liverpool with only forty-six men, and the policy was therefore void.

Here the contract was to insure the vessel on condition that she sailed from Charlottetown not later than the 15th of December, that condition was not performed, and, therefore, the plaintiff can have no right to recover against the defendants on a risk against which they did not undertake to indemnify.

On the argument it seemed to be assumed that had the printed clause, prohibiting the vessel "from entering the Gulf of St. Lawrence before the 15th of April, or being in it after the 15th of November," stood alone, it would have been an exception and not a condition, the breach of which would only suspend, not terminate the risk. In one sense it is quite true, as was argued, that there can be no deviation on a time policy because there is no prohibited track to deviate from, but Mr. Parsons observes "that although 'deviation' in the law of insurance originally meant only a departure from the course of the voyage, it is now always understood in the sense of a material departure from, or change in the risks insured against, without just cause. There may be a deviation while the ship is in port, or where the insurance is on time, no voyage being indicated." Now looking, as I must do, at the peculiar kind of danger, viz., from ice, likely to be encountered by vessels navigating many parts of the Gulf of St. Lawrence between the 15th of November and the 15th of April, and considering the difficult questions which often arise where a vessel receives

her death wound, or is seriously injured before the expiration of a time policy, but is actually lost after it expires, and that injuries from ice might often give rise to similar questions from their being of a kind that would render it very difficult to decide on, for such injuries might have contributed to her ultimate loss. It might, at least, be open to contend that the underwriters never could have intended to subject themselves to risks so uncertain, or to liabilities so difficult to be ascertained. And, also, particularly looking at the language of the latter part of this printed clause, "not to enter the Gulf, etc., without payment of additional premium and leave first obtained," words very much stronger than those which in *Graham v. Barras* (1), were held to render the previous assent of the underwriters to accept the additional premium necessary to an extension of the time for sailing. It seems to me by no means clear that this printed clause is not in itself a warranty. But I express no opinion on this point, and I have only alluded to it to guard against being understood by the many persons who, I presume, are now insuring under similar policies, that stipulations such as this can be violated without danger of discharging the underwriters from all subsequent liability.

The judgment must be for the defendants.

(1) 5 B. & Ad. III.

HEARD & HALL V. THE P. E. I. MARINE INSURANCE CO.

Marine Insurance—Partial loss—Abandonment—New trial.

Plaintiffs shipped a cargo of fish to the West Indies, but the vessel was caught in the ice and remained there all winter, whereby the cargo was damaged. She got into Halifax in May, and the owners gave the underwriters notice of abandonment, and the captain sold the cargo for the benefit of all concerned, and the plaintiff claimed for a constructive total loss. The fish were re-dried and re-packed by the purchaser and shipped to the West Indies, and, though discolored, were not much injured. The jury found a total loss, and defendants moved to set the verdict aside and for a new trial, on the ground that the evidence shewed there was only a partial loss.

Held, (Peters, J., Hodgson, C. J., and Hensley, J., concurring) That the finding of the jury was wrong, the loss being partial and not total, and that there must be a new trial.

MOTION to set aside verdict and for a new trial.

13th May, 1871.

Mr. Davies shews cause; Palmer, Q. C., follows.

Mr. McLeod, *contra*; Haviland, Q. C., and Mr. Charles Palmer follow.

Cur. ad. vult.

21st October, 1871

PETERS J. This was an action on a policy of insurance. The vessel was bound for the West Indies with a cargo of fish and valued at £1000, and having received damage by stranding in getting out of Charlottetown Harbor was caught in the ice pack in Northumberland Straits, where she remained drifting about all winter whereby the cargo was damaged; and got into Halifax in May. The owners gave the underwriters notice of abandonment, and the captain with the consent of Heard, one of the owners of the cargo and also the owner of the vessel, sold the cargo at Halifax for the benefit of all concerned, and now claim for a constructive total loss.

The rule as laid down in *Rosetto v Gurney* (1) and which is confirmed by *Farnworth v. Hyde*, (2) is that

(1) 11 C. B. 176.

(2) L. R. 2. C. P. 204.

where goods are damaged the question for the jury to determine is "was it practicable to send the whole or any part of the cargo to its place of destination in a marketable state" and that to determine that question the jury must ascertain the cost of unshipping the cargo, the cost of drying and warehousing it, the cost of transporting it in a new bottom (when necessary) and the cost of the difference of transits, if it can be effected at a higher than the original rate of freight, add to those items the salvage allowed in proportion to the value of the cargo saved and the loss will be total, if the aggregate exceed the value of the cargo when delivered at the port of discharge, but if the aggregate do not exceed the value of the cargo or of the part of it saved, the loss will be partial only.

Now, in this case, the plaintiffs' evidence was defective in two most material points. First, as to the state of the fish and the extent of the damage it had sustained, as the testimony of their witnesses showed that they had formed their opinions as to its state without opening the packages or taking proper means to ascertain their real condition. Again, the plaintiffs' evidence to show that there were no facilities for drying the fish in Halifax was of the most flimsy description, consisting of the opinions of persons here who could not state what the extent of the facilities really was.

Secondly, no evidence was given of what the probable value of the fish, when dried and repacked, would have been at the port of destination. And this was opposed by the testimony of others, particularly West and Cronan, two merchants of Halifax, who bought a very large portion of the cargo at prices lower, but not so very much lower, than the invoiced value, who had it redried and repacked and shipped it to the West Indies, and who state that the packages of fish (with a few exceptions) though discolored on the outside, were not much injured, and that they only required a day or two airing and drying before repacking.

I think it clear that there was no evidence justifying the jury in finding a total loss.

There is no doubt there was a partial loss. The defendants have paid £100 into Court, but there is no evidence whatever of what the salvage expenses on a partial loss, viz., for drying, repacking, &c., would have been and therefore, we are entirely without materials for forming a judgment as to whether the partial loss does or does not exceed that amount.

The rule for a new trial must be absolute.

DOE DEM JOHN GREEN, DANIEL S. GREEN, JESSE GREEN
AND H. MOYSE V. DANIEL GREEN, JOHN GREEN AND
CHARLES GREEN.

Ejectment—Will—Interlineation—Custody—Evidence.

D. Green, senior, who died in 1825. before the passing of the Will Act of 1843, devised 100 acres to his son, D. Green, junior, and "the heirs of his body forever," the words "heirs of his body forever" being interlined. The devisee died unmarried, and the plaintiffs claimed as co-heirs of D. Green, senior, against the trustees of Joseph Green, residuary devisee under the will of D. Green, senior. D. Green, junior, survived the testator over thirty years. The will was drawn by Samuel Green (no relation of any of the parties), and the interlineation was in his hand-writing, and appeared to be in the same ink as the rest of the will, and he was a witness to the will. He survived D. Green, junior, several years, and he had had the custody of the will from the time of making it until the testator's death, and no question was raised during his lifetime. Ellis, another subscribing witness, swore that he believed the will was now in the same state as when he signed it. It was not disputed that if the words interlined were not to operate as part of the will the lessors of the plaintiff would be entitled to recover, and it was contended on their part that there was no sufficient evidence to shew the interlineation to have been made before the execution of the will. At the trial the judge directed the jury that if they were satisfied from the evidence that the interlineation had been made before the will was executed to find for defendants, which they did. The lessors of the plaintiffs moved to set aside the verdict on the ground that the evidence did not warrant the finding.

Held, (Peters and Hensley, J. J.: Hodgson, C. J., concurring)
That the evidence warranted the finding and that the rule must be discharged.

MOTION to set aside verdict for defendants in ejectment as not warranted by the evidence.

10th May, 1872.

Charles Palmer, Q. C., shews cause; Longworth, Q. C., follows.

Mr. Hodgson, *contra*; Mr. Bayfield follows.

Cur. ad. vult.

25th June, 1872.

PETERS J. This was an action of ejectment brought by the lessors of the plaintiff, co-heirs of old Daniel Green, against the defendants, trustees of the late Joseph Green, for land claimed to have passed to him, as residuary legatee under the will of his father, the said old Daniel Green, and it is on this last will that the present question arises. By it the testator devised the *locus in quo*—one hundred acres of land on which part of Summerside stands—to his son Daniel Green and the heirs of his body for ever, but the words “heirs of his body for ever” are interlined. Daniel Green the devisee, was never married. The testator died in 1825, before the new Will Act of 1843, and the case is therefore governed by the law as it stood before the passing of that Act.

William Ellis, the subscribing witness to the will and on whose oath probate was obtained, stated that the will was written by Samuel Green, who although not a professional man was in the habit of drawing up documents; that the testator came to Samuel Green’s house, was closeted with him in a room most of the day; that Samuel Green came out and called witness in to witness it; that when he went into the room the will was written and lying on the table; that the testator signed first and then the witness; that after the will was signed it was folded up and laid on the table, and that the testator returned that night to Bedeque. The witness did not know whether the testator took the will with him or not. But it appeared from other evidence, that the will must, or most probably did, remain in the custody of Samuel Green (who wrote and was a subscribing witness to it) until after or just before the testator’s death. The evidence of John Green, a son of the testator and one of the plaintiffs, on this point was, “I think they sent Joseph Green to Samuel Green’s for the will; they told me so in the house (meaning his father’s house). It might have been after or before the funeral, but he

thought it was a week before he died. The interlineation was in the hand-writing of Samuel Green, who wrote the will, and the ink appeared to be the same as that with which the body of the will was written."

Daniel Green, the supposed tenant in-tail died about 15 years ago. Samuel Green, who wrote the will survived him several years.

It was contended that there was no sufficient evidence to show that the interlineation was made before the execution of the will.

I directed the jury that if they were satisfied from all the evidence, that the interlineation was made before the will was executed to find for the defendants, which they did. A rule nisi was granted to show cause, why the verdict should not be set aside, on the ground that the evidence did not warrant the finding.

Where an alteration appears in a will, the presumption is that it was made after the will was executed, and that presumption continues until the party seeking to derive advantage from the alteration adduces evidence to show that it was made before the will was executed. This is the doctrine laid down by the Privy Council in *Cooper v. Bockett* (1) and affirmed by *Simmons v. Rudall* (2) and *Doe d. Shalcross v. Palmer* (3). The simple question for the Court, therefore, is whether the evidence warranted the finding; and I am of the opinion that it did.

It was contended that the evidence placed this case on all fours with *Cooper v. Bockett* (1) therefore that the decision should be the same. Now assuming that Ellis, the witness to the will, stated that he did not know whether the interlineation was in the will when it was executed or not (to which I will hereafter advert) there is a material difference between the evidence in that case

(1) 10 Jur. 931. S. C. 4, (3) 15 Jur. 836; S. C. 16. Q.
Moore P. C. C. 419. B. 747.

(2) 15 Jur. 837; S. C. 1 Sim.
N. S. 134.

and the present. In *Cooper v. Bockett* (1) the witnesses could not tell whether the interlineations existed when they signed. So far the cases would be similar. But in *Cooper v. Bockett* (1) the alterations were in the testator's own hand-writing, and the will remained in his custody, so that he might have made the alteration at any time. But here the will is written by another and there is ample evidence to warrant a jury in coming to the conclusion that it remained from the moment of its execution, until after or just before the testator's death, in the writer's possession. Indeed the evidence, I think, raises a very strong presumption that it remained in Samuel Green's possession until after the testator's death. His children must have known that he had executed it and that it was in Samuel Green's possession, or they would not have sent Joseph Green to him for it, and it is not very likely that they would send for it or that Samuel Green would give it up to them before the testator's death without some order from him or his bringing it himself, a circumstance which the witness would be likely to recollect. But he would, after the testator's death with perfect propriety deliver it to Joseph Green, who, he knew, was the residuary legatee and executor.

Again, in *Cooper v. Bockett* (1) the evidence of the expert was as follows: "according to my judgment the words in the 9th and 10th lines (relating to the substitution of Captain Symonds for the Pratt family) which I have specified and by which the words originally written were defaced, were written at a different time and after the will was completely written; some time afterwards according to my belief. The ink itself is different in my opinion." To the 4th interrogatory he said: "The will which I have deposed to has the appearance of having been at one time inclosed in a different envelope from that now produced to me by the examiners. Folding up to enclose it in that envelope I

(1) 10 Jur. 931. S. C. 4 Moore P. C. C. 419.

find that the wax, not forming part of the impression the other part of which is in the envelope, has no corresponding mark or stain on the envelope and must have been made by the use of wax when the will was sealed in some other envelope." And in giving judgment, Lord Brougham says: "It is not immaterial to observe that there is evidence of the testator's having taken the will out of the cover in which he had enclosed it when he executed it. This evidence would raise a presumption that he might have taken it out to make an alteration. Had the evidence there raised a presumption that he immediately sealed it up and that the seals were unbroken, the decision in *Cooper v. Bockett* (1) would probably have been different.

In *Doe d. Shallcross v. Palmer* (2), the importance of the custody of the will after its execution in determining questions of this kind is very strongly put. There the testator, two or three weeks before his death, gave his housekeeper a sealed packet containing his will. The counsel, in arguing, shewed that the interlineation was in the hand-writing of the testator, and went along the crease made in the paper by folding it up in the form of a letter, and that its appearance shewed that it must have been written before it was folded up and put in the envelope. Coleridge, J., observed, "If the papers had been taken by another person, and kept by him until after the death of the testator, that would have been almost conclusive." In that case the will remained in the testator's custody for some time after its execution, yet Lord Campbell, in giving judgment, says, "there seems every reason to believe that he sealed up the will immediately after its execution, and he certainly delivered it to Mary Thornton, intending that it should remain in her custody until he should commit the fatal act which he then meditated. We, therefore, think that the jury were fully

(1) 10 Jur. 931; S. C. 4 Moore (2) 15 Jur. 836; S. C. 16. Q.
P. C. C. 419. B 747.

justified in coming to the conclusion that the alteration was made before the will was executed."

In the present case the evidence is stronger than in *Doe dem Shallcross v. Palmer* (1), as it shews almost conclusively that the will never was in the testator's possession after its execution. But it is said that Samuel Green may have made the alteration after its execution. The answer to that is, first, that he had no interest in doing so, and, secondly, that if he did it without the testator's direction it would be a fraud or wrong, but that must be proved, as the legal presumption is against fraud or wrong, and it is on this principle that the distinction between wills and deeds, respecting the time at which alterations and interlineations are presumed to have been made, is founded. In a deed they are presumed to have been made at the time of making the deed, because no one can alter it after it is executed without fraud or wrong. But a testator may alter his will after execution without fraud or wrong, and therefore there is no ground for presuming that the alteration was made before the will was executed. But it is said that the testator might have directed Samuel Green to make the alteration. The answer to that is, "It is possible that he might," but the defendants' evidence having raised a presumption that the interlinings were made at the time of the execution of the will, the onus of rebutting that presumption is shifted on the plaintiffs, who cannot get rid of it by a mere suggestion of the possibility of the testator's having directed it to be done, but must adduce some evidence that he did so; and there was no evidence tending to show it.

There is another circumstance which is not immaterial. The testator had four sons, Daniel, John, Jesse and Joseph. He devises specific parts of his land to the three first, and in each of these devises the words "and to the heirs of his body forever," in the same ink and

(1) 15 Jur. 836; S. C. 16. Q.B. 747.

hand-writing, and apparently with the same pen, are interlined. But when he devises the residue, it is to Joseph and his heirs forever, nothing being interlined. Now, it is not at all probable that he intended to give his three sons only a bare life estate, and thus leave their children (if they had any) nothing. At the same time it looks as if he wished to keep the property in his family, if the heirs of any of these three sons failed, and the use of proper words to pass a fee when devising the residue to Joseph, shows that Samuel Green, the writer, knew the different effects of the words "heirs" and "heirs of the body," and it is very probable that on reading over the will it would strike him, and likely the testator also, that as the words stood it would not carry out his intentions, and, therefore, the interlineations were made to secure it to the children of those three sons, if they had any.

Again, all the parties, or their representatives, have treated the will as creating an estate tail. John Green, one of the plaintiffs, says he treated it as an estate tail, and that he signed and acknowledged a deed barring the entail of his land. And Daniel Green, one of the defendants, also testifies that the will as it stands was always acted on by all the family. Now Daniel Green (the supposed tenant in tail) died fifteen years ago. Samuel Green, who wrote and witnessed the will, survived him some years. Now, on the death of Daniel Green, the plaintiffs, or those whom they represent, would likely inquire into the facts respecting these interlineations, and would naturally resort to Samuel Green, who wrote and witnessed it and who lived in the neighborhood, for an explanation. If they did so, and were not satisfied, why was no question raised about it in his life-time? But if they made the enquiry and were satisfied that the interlineations were made before the will was executed, it would account for their silence while, during twelve or fifteen years, they had seen Joseph Green, as residuary legatee, claiming and exercising

dominion over and disposing of property to which they, as heirs of the testator (if the interlineations were not so made) would have an equal right.

I do not forget the argument that the charge of £5 on each of the devisees gives them (if the interlined words are struck out) a fee simple; but there is not the slightest probability, that the writer of the will, the testator, or any of his representatives knew anything about that highly technical rule of construction, that an indefinite devise with the payment of a sum of money charged on the devisee gives him a fee simple. It is true, as a general proposition, that want of knowledge of the law does not excuse any one so as to exempt him from the consequences of his acts. Thus a person indicted for an offence is not permitted to plead ignorance of the law making the act criminal. Nor in the absence of fraud will ignorance of the legal effect of a contract excuse from damages for the breach of it. But, as observed by Lush, J. in *Regina v. The Mayor &c., of Tewksbury* (1) there is no maxim which says, that for all intents and purposes a person must be taken to know the legal consequences of his acts; and when we are merely looking at acts to ascertain the reason why, or the time when certain other acts were done, it would be contrary to common sense to suppose that parties ignorant of the law, were acting under the influence of technical rules with which we feel certain they must have been entirely unacquainted.

The rule that alterations in a will are presumed to be made after the will was executed is of the highest importance. Without it all the protection which the statute throws around persons and property would be abrogated, and even where the alteration was made by the testator himself, there would be no security that when he made it he still possessed a sound disposing mind. But it is not because alterations appear in a will, which

(1) L. R. 3. Q. B. 629 at 639.

attesting witnesses did not observe, or that time has removed those who could state when they were made, that they necessarily become in-operative. The law raises the presumption to uphold the intentions of testators and the rights of persons, not to defeat them; and therefore to rebut the presumption and show that they were made before execution, the appearance of the will, the handwriting, the custody of the document, and an infinite variety of circumstances are allowed to be considered. The old saying, so often used when intentions are discussed, that "straws show how the wind blows," affords a not inapt illustration of the influence, which apparently very trivial facts may have on inquiries of this nature. Thus in *Cooper v. Bockett*, (1) the mark of the seals was the straw which showed that the envelope in which the will was found was not that in which it had been at first enclosed; while in *Doe d Shallcross v. Palmer*, (2) the crease in the document was the straw which showed that it was, and these in themselves, trivial facts, had in each case a material influence on the result. A little consideration will show that if all such circumstances were not taken into consideration, or if the acts and declarations of parties whose interests are affected by the alterations were entirely excluded, the consequences might be most mischievous. Parties who, as in this case, had long acted on and treated alterations as valid might, when the witnesses who could uphold them were dead, turn round and overthrow family arrangements of great importance, made on the faith of the validity of such alterations, and thus acquiescence and the hoar of time, instead of assisting to confirm such arrangements, would be constantly rendering them more insecure.

In considering the case I have so far assumed that Ellis, the subscribing witness, stated that he could not tell whether the interlineations were made when the will

(1) 10 Jur. 931. S. C. 4 Moore (2) 15 Jur. 836. S. C. 16. Q.
P. C. C. 419. B. 747.

was executed or not. But he did not do so. He in fact stated that the will was now in the same state as when he signed it, and it arose in this way. On his examination in chief he was only asked as to the signature and execution of it by the testator. But on cross-examination Mr. Charles Palmer put a question which elicited this reply—"the will is in the same state as when I signed it." The counsel then adroitly carried him to the time of his swearing to it at the Probate Office, and interrogated him as to whether the interlineations were in it then; to which he answered—"all he looked at in the office was the signature." Now it was for the plaintiff's counsel, by re-examination, to ascertain whether the witness meant, as his words might imply, that the interlineations were in the will when he witnessed it. But he did not do so. In leaving it to the jury I was passing over this, but Mr. Palmer called my attention to it, and urged that they had a right to have that expression submitted to the jury, and on considering it I saw that he was right, and I accordingly left it to the jury to consider what he meant by that expression, remarking that I thought his expression was owing to the question which elicited the answer, and that he only meant that the document generally appeared in the same state. What weight the jury gave to this it is impossible to say, and if the other evidence and circumstances had not been sufficient to warrant the finding, it would have been for the Court to consider whether a new trial should be granted on the ground of uncertainty as to what the witness meant, on payment of costs; as the uncertainty arose from the omission of the plaintiffs' counsel to put the direct question. But as the general rule is that a new trial will not be granted in ejectment, where the verdict is for the defendant, nor because the verdict is against evidence in a hard action,—which I certainly consider this to be,—it is not likely that a new trial would have been granted on any terms, but for the

reasons I have stated it is not necessary to decide this point.

HENSLEY, J. This case was tried at St. Eleanor's, in Prince County, in June Term, 1871, and a verdict rendered for the defendant. In support of the claim of the lessors of the plaintiff, the will of the late Daniel Green, dated 16th December, 1824, was put in evidence, and it appeared that the testator himself died December, 1825, and the will was proved on the 20th February, 1826.

The will when produced appeared to have been interlined in several material parts. The question in this case arose in connection with such an interlineation made over a devise of the land in dispute to the testator's son, Daniel Green, by these words:—"I also give and bequeath to my son, Daniel Green, that part of my land described as follows," etc., (describing land) which includes the land to recover which this action was brought. The words "and to the heirs of his body forever" appeared interlined over and so as to read immediately after the name "Daniel Green," so that, supposing them to form part of the will, the devise as interlined would be, to "Daniel Green and the heirs of his body forever," instead of simply to "Daniel Green," without further words of limitation.

It was not disputed at the argument that if the words interlined were adjudged not to operate as part of the will, the lessors of the plaintiff would be entitled to recover, and the case at the trial seems to have also turned solely upon that point. The will was duly attested and executed so as to pass real estate, and was in the hand-writing of Samuel Green, one of the witnesses, who died in 1864, between thirty-eight and thirty-nine years after the testator. The interlineations appeared to be written in the same hand-writing, and the color of the ink was also like the color of the ink in the body of the will. It was also in evidence that the will was executed at

Samuel Green's house, and then folded up and laid upon the table.

John Green, in his cross-examination, stated that after the testator's death some one, he thinks Joseph Green, was sent to Samuel Green's for the will, and there was nothing to show that the testator had had any possession of the document between the time of its execution and his death. William Ellis, one of the witnesses at the trial, swore in general terms that the will was then "in the same state," he believed, "as when it was signed," but, whether designedly or not, the plaintiffs' counsel forbore, in cross-examination, to test his strict knowledge as to the interlineations, and left the evidence thus general as to the state of the will.

Daniel Green, the devisee, died about two years before Samuel Green, the witness, but no question was raised on these interlineations until the year 1871. Some evidence was also given that John Green, one of the lessors of the plaintiff, had treated this devise as conferring an estate tail upon Daniel Green. On this evidence the judge left it to the jury to decide whether the interlineations were written before or after the signing of the will, and by their verdict of not guilty they found that they were written previously to its execution by the testator.

The argument on the part of the lessors of the plaintiff, therefore, is that it was improperly so left, and that there was no evidence upon which a verdict could be founded.

The current of cases decided appears to me fully to establish the doctrine that in the case of an altered will the presumption is that such alteration was made after its execution, and such presumption can only be taken away by evidence rebutting it. It was so decided in the case of *Cooper v. Bockett* (1), recognized and again laid down by Lord Campbell in delivering the judgment of the Court of Queen's Bench in the case of *Doe dem Shallcross*

(1) 10 Jur. 931. S. C. 4 Moore P. C. C. 419.

v. Palmer (1), in the case of *Doe dem Tatham v. Catamore* (2), by Vice Chancellor Lord Cranworth in the case of *Simmons v. Rudall* (3), by V. C. Sir W. Page Wood in *Williams v. Ashton* (4), and by Sir J. P. Wilde in the case of *The Goods of Cadge* (5), all referred to at the argument. It became incumbent, therefore, on the defendants in this case to adduce some evidence from which it might be inferred that the alteration was made before the will was executed.

The sole question therefore is, was there any sufficient evidence to go to the jury on this point? Now although one item or link of evidence, if standing by itself might not be alone sufficient to warrant the finding of a jury yet if taken together and in combination with other items the whole may form sufficient for the purpose of satisfying the legal requirements of the case. For instance, the appearance of the will and the alterations, such as being in the same hand-writing and same colored ink and apparently made with the same pen, suggesting the idea that all were made at the same time, although I think not sufficient alone, is some slight evidence which a jury may consider in conjunction with other facts. In the case of *Doe d. Shalcross v. Palmer*, (1) at the trial the defendant's counsel *inter alia* contended that the appearance of the will afforded evidence that the alteration must have been made before it was executed from the appearance of the fold and the ink upon it, and Lord Campbell told the jury to look at the will and left that point of evidence with them along with others, in arriving at their verdict, and when in showing cause for a new trial, counsel for the plaintiffs argued that the appearance of the will, such as the writing being on a crease, &c., was no reasonable evidence, referred to the

(1) 15 Jur. 836. S. C. 16. Q.	(3) 1 Simons R. N. S. 134.
B. 747.	(4) 1 John & Hem. 115
(2) 16 Q. B. 745.	(5) L. R. 1 P. & M. 542.

case of *Knight v. Clements*, (1) which decided, in the case of a bill of exchange or other negotiable instrument, that inspection alone was not evidence on which the jury should act, Lord Campbell interposed and said that case has been followed as to negotiable instruments, but it would be dangerous to apply the same doctrine to wills, where evidence of a similar kind has often been allowed for the purpose of showing the time of the execution and Sir J. P. Wilde in the case of *The Goods of Cadge*, (2) incidently, in giving judgment, refers to the fact that the interlineations in question, were apparently written with the same ink and at the same time as the rest of the will.

Then there was the evidence of the witness, William Ellis, that the will was, he believed, in the same state as when it was signed, and although it would have been more satisfactory if he had been pointedly interrogated as to his knowledge of the interlineations, yet it was incumbent on the plaintiffs to have examined him upon this point, if they thought his reply would have helped them and the inference to be drawn from their silence, on this very vital point, is that it was contrary to their interests to pursue the enquiry on the point further than they did.

Then again the length of time allowed to elapse after the death of the testator and until and after the death of the writer of the will, Samuel Green, was a circumstance proper for the jury to consider in connection with the other points to which I have already alluded.

I, therefore, think that there was sufficient evidence to justify the jury in coming to the conclusion, which they did in this case, and that the verdict should not be disturbed. The rule for a new trial ought in my opinion to be discharged.

HODGSON C. J. concurred.

(1) 8 Ad. & El. 215.

(2) L. R. 1 P. & M. 542.

IN CHANCERY.

GEORGE W. DEBLOIS v. THE QUEEN IN HER GOVERNMENT OF P. E. ISLAND.

Petition of Right—Railway Act—Land damages—Reasonable time—Reference to independent parties when Masters disqualified.

The Railway Act empowered Commissioners to deprive private persons of property required for railway purposes. If dissatisfied with the compensation awarded, such persons could apply to a board of appraisers to be appointed for the whole Island to assess the damages. who were to give notice of the time when they would examine the land and assess the damages, and sec. 14 enacted that they should "transmit the assessment to the Lieutenant Governor in Council, who should direct payment to be immediately made." The Government, instead of appointing one board for the whole Island, had appointed three, one for each County, and it was not until two days before the hearing that one general board was appointed. On 6th October, 1871, the commissioners entered upon part of petitioner's land, and it became vested, under the provisions of the Act, in the public for railway purposes. On 8th February, 1872, petitioner made his claim on the commissioners for compensation, who, on 9th April, awarded him \$259.55. Being dissatisfied he, on the 17th April, 1872, applied to the appraisers to ascertain the amount of compensation according to the Act, but they failed to give the required notice, and he commenced this suit on 6th May, 1872. The Government sent in their resignation on 18th April, which was accepted on 22nd April, and on the same day the resignation of the appraisers was accepted, and no new ones appointed until 8th May. For the Crown it was contended that under the peculiar circumstances there had been no unreasonable delay in giving the notice, and that petitioner was too hasty in bringing his suit and that his petition should be dismissed, and that he ought to revert to the assessors to assess his damages. Petitioner's counsel objected that there was no legal board of appraisers in existence when the action was brought, the Government having appointed three boards instead of one, and that as the appraisers were appointed by the Government itself it was not equitable to send the case back to them. All the Masters were disqualified to act, and therefore no reference could be made to them, and the question arose as to how the amount of compensation could be ascertained if the matter was not referred to the board of appraisers.

Held. (Peters, M. R.) That there had been unreasonable delay, and that at the time the action was commenced there was no legal board of appraisers.

2. That a commission under the seal of the Court of Chancery should issue to five independent persons to assess the amount of compensation, and to return their proceedings to this Court, when it would be open to either party to take exception to the return in the same manner as to a Master's report.

PETITION OF RIGHT.

13th July, 1872.

Mr. Hodgson for petitioner.

The Attorney-General, Longworth, Q. C., and Mr. Fitzgerald for the Crown.

Cur. ad. vult.

22nd July, 1872.

PETERS M. R. This is a petition of right, referred to this Court by the Lieutenant Governor, raising certain important questions as to the construction of the Railway Act.

The facts briefly stated are these. On the 6th of October, 1871, a portion of certain lands belonging to the petitioner situated in the Royalty of Charlottetown, were entered upon by the railway commissioners under the powers conferred on them by the Act, and by virtue of that entry and other proceedings, taken in accordance with the provisions of the Act, the title to the lands so entered upon became duly vested in the public for railroad purposes. On the 8th day of February, 1872, the petitioner duly made his claim to the commissioners for compensation, and on the ninth day of April the commissioners informed him that they had awarded him the sum of \$259.55 for compensation, which not being satisfactory, he on the 17th of April, made application to the appraisers to proceed to ascertain the amount of compensation according to the Act, but the appraisers failed to give the required notice, and have paid no attention to his application. It is first contended that the

petitioner was too hasty in bringing his suit and therefore that the petition should be dismissed.

It is argued by Mr. Longworth that when under the 19th section a proprietor or commissioners apply to the appraisers, they are not bound at once to give notice of the time at which they will examine the land entered upon and assess the damages, but that they must be allowed a reasonable time to determine when it will be convenient for them to attend to that duty and that under the peculiar circumstances of this case, such reasonable time had not expired on the 6th of May, when the petitioner commenced his suit. The peculiar circumstances relied on to support this branch of the argument are these:—That the late Government tendered their resignation on the 18th of April, which was accepted on the 22nd, that on the same day the resignation of the appraisers was accepted, that no new appraisers were appointed until the 8th of May, that this delay was consequent upon the change of Government, and therefore should be held an excuse for not more promptly attending to the petitioner's application. The general principle of law no doubt is, that where an act—whether official or otherwise—is to be done and no specific time is fixed for doing it, a reasonable time must be allowed the party or officer to perform it, but what is a reasonable time depends on the nature of the thing to be done, and other engagements of a similar character which the party or officer may, at the time of being called upon to do the act, have to occupy his attention. The rule on this subject as regards contracts is thus laid down by Mr. Addison, p. 942: “Where no time is fixed for the performance of a contract, it must be performed in a reasonable time according to circumstances. A contract to do a particular thing “directly,” or “as soon as possible,” or “forthwith,” does not mean that it is to be done instantaneously, but there must be no delay in performance, and such a contract requires a much more speedy fulfillment

than a contract to do a thing within a reasonable time." These principles are, it appears to me, equally applicable to cases where public officers are required to perform certain acts pertaining to their official duty. Now, to ascertain whether this case falls within the general rule as to reasonable time, or within that which requires a much more speedy performance, we must consider the object of the Act, the manner in which private rights are liable to be affected by it, and also the words of the Act respecting the payment of the compensation to the parties injuriously affected. The object of the Act is to construct a work which we must assume will be one of great public utility, for this purpose it empowers certain Government officers, called commissioners, to deprive private persons of their property against their will. Now I cannot presume that the Legislature intended to authorize the Government officers to enter upon the land of an individual, pull down his house or buildings, without providing for the prompt ascertainment and payment of the compensation to which he would be entitled, and which he might require to provide a house to put his head under, but the 14th section of the Act enacts "that the appraisers shall transmit the assessment to the Lieutenant Governor in Council, who shall direct payment to be immediately made to the person entitled thereto." Now this section seems to furnish a key to the interpretation of the 19th sec., and, I think, clearly shows that the Legislature intended that the proceedings of the Government appraisers to ascertain the amount of compensation should be taken with a dispatch corresponding to the promptness with which payment of the amount when ascertained is expressly directed to be made; and therefore that the notice, which under the 19th sec. the appraisers are required to give, is an act which falls within the rule applied to that class of cases when a thing is required to be done "forthwith," or "directly," and that the delay of the appraisers to take any notice of the petitioner's application from the 17th of

April to the 6th of May when he commenced his suit was not such a prompt performance of their duty as the law required, and fully justified the petitioner in seeking his remedy in this Court, unless the peculiar circumstances relied on in the answer can be held sufficient to make this case an exception to the general rule. The peculiar circumstances are stated in the answer of the Attorney General, as follows: "And the said defendant, in behalf of the Government of this Island, submits to the consideration and judgment of this honorable Court the peculiar circumstances of this case, and the difficulties under which the several boards and officers constituted and appointed under the said Act were placed, by the fact that the local administration, or the members of the Executive Council, constituting the executive government or the responsible advisers of the Lieutenant Governor in this colony, and by whom the said several boards and officers under the said Act were appointed, resigned or tendered the resignation of their offices on the 18th day of April, 1872, and such resignations were accepted, and a new administration or board of executive councillors was appointed by the Lieutenant Governor on the 22nd day of the said month of April, and that the said board of commissioners under the said Act, and the said chairman of appraisers of Queen's County, did severally resign their respective offices, and the same were duly accepted by the Lieutenant Governor of the said Island, the said board of commissioners having resigned on the 19th day of the said month of April, and the resignation of their offices having been accepted by the Lieutenant Governor on the 22nd day of the said month of April, 1872, and the said chairman of appraisers for Queen's County having resigned his office on the 22nd day of the same month of April, and the same having been accepted by the Lieutenant Governor on the day of such resignation. That a new local government, or board of executive councillors, having been so appointed as last aforesaid the

said last mentioned government appointed on the 8th day of May, 1872, and with all reasonable dispatch, a new board of commissioners under the said Railway Act, consisting of B. Davies, Angus McMillan, and Peter A. McIntyre, Esqs., and also, on the 9th day of May in the year aforesaid, with the like reasonable dispatch, appointed a new chairman of appraisers for Queen's County under the same Act, namely, David Mutch, Esq., who with eight other persons have been constituted and appointed by the Government of the said Island a new board of appraisers under the said Act."

Now, I apprehend that although the composition of the Executive Council, so far as the individuals comprising it are concerned, may change, yet in contemplation of law the Executive Council always exists, as the Governor is not supposed to accept the resignation of his present councillors until others are prepared to take their place, and that the Government, although the members of the Executive Council only remain such until others are appointed, are bound to provide for the proper government of the country by appointing persons to discharge the functions belonging to the different public offices. The greatest public inconvenience might occur if it were not so. Suppose, for instance, that the office of treasurer, collector of excise, or registrar of deeds, was allowed to remain vacant for a single day, it is obvious that the consequences might be highly injurious to individual as well as public interests. But from the answer it appears that a new Executive Council was formed on the 22nd of April, the very day on which the appraisers resigned, so that, in fact, no legal difficulty existed in filling their places immediately on their becoming vacant, political difficulties there may have been, but to these the Court cannot pay attention. If, then, the Government is bound to keep the different offices constantly provided with officers to discharge the duties respectively belonging to them, would it not be contrary to every principle of reason and justice

to permit it to plead its own default for the purpose of turning the petitioner out of a Court to which that very default has compelled him to resort for redress, and which but for that he could have obtained more expeditiously from another tribunal? I think that it would. The principle laid down in Chancellor Kent's note, cited by Mr. Angell on Watercourses, p. 660, is very applicable to this point, he says, "the better opinion is that the compensation or offer of it must proceed or be concurrent with the seizure and entry upon private property under the authority of the state. The Government is bound in such cases to provide some tribunal for the assessment of the compensation, before which each party may discuss their claims on equal terms, and if the Government proceeds without taking these steps their officers may and ought to be restrained by injunction"(1). He further says, "the settled and fundamental doctrine is that Government has no right to take private property for public purposes without giving a just compensation; and it seems to be necessarily implied that the indemnity should, in all cases which will admit of it, be previously and equitably ascertained, and be ready for reception concurrently in point of time with the actual exercise of the right of eminent domain." "It may be remarked," says Mr. Angell, "that Chancellor Kent has not given the foregoing opinion in view of any constitution requiring, in direct terms, a previous indemnity, but in reference to constitutions containing nothing more than the general provision that private property shall not be taken for public uses without compensation being made, and in reference also to the universal principles of justice. Besides, it was objected on this argument that no legal board of appraisers ever was in existence, the Government having appointed three boards, namely, one for each County in the Island, whereas the Act only authorizes the appointment of one for the whole Island. The Attorney-

(1) 2 Kent, 339.

General scarcely attempted to answer this objection, and on looking at the Act, I do not see how he could. But he admitted that only two days before the hearing the error was remedied by forming one board for the whole Island. Therefore (putting aside the peculiar circumstances) it is plain that there never was a board of appraisers who could give a legal notice to apply to. It is not improbable that the discovery of this error may have been the cause of no notice being taken of the petitioner's application; but that can have no influence on this suit, and the Government therefore stand in the position pointed out by Kent, of never having provided a tribunal before which parties might discuss their claims for indemnity. It is further submitted that as the board of appraisers are now ready to hear the petitioner's application the Court should dismiss his petition and leave the petitioner to apply to it to assess his damages. The answer on this point is as follows:—"And this defendant further submits that in as much as the said petitioner does not object to any insufficiency of funds on the part of the Government to pay the full and just value of the said lands so taken, and as the tribunal, recognized by the said Act for ascertaining the value, was constituted and provided by the Government of the said Island with all reasonable dispatch, and within a very short period after the time of the petitioner's application to William Heard, the late chairman, and as the said tribunal or board of appraisers are prepared and ready and willing to proceed at once with the said valuation and assessment, it would be only just and equitable to allow the remedy provided by the said Act, and the mode of ascertaining the value and damages aforesaid as distinctly pointed out to be pursued and followed by the said petitioner in this case." It is a rule respecting the exercise of equity jurisdiction that when it has once acquired cognizance of a suit it will entertain it for the purpose of giving complete relief. In

Story's Fonthl. Eq. 497, it is said, "and when this Court can determine the matter it shall not be an handmaid to other Courts, nor beget a suit to be ended elsewhere. And therefore where a trial at law was pressed for, whether there was a new publication or not, it was said the cause must properly end here; and where the Court has a jurisdiction as to the end it must have it likewise as to the means." The ground on which this rule rests is said to be the propriety of preventing a multiplicity of suits, and Story, in his Equity, p. 84, after noticing some contradictory cases on the subject, and alluding to the cases in which equity will retain its jurisdiction, concludes, "And in the last place, where neither of the foregoing principles applies, there is great force in the ground of suppressing multiplicity of suits, constituting, as it does, a peculiar ground for the interference of equity." Now here the petitioner was compelled to resort to this petition of right; as at the time of filing it there was no other mode open to him for obtaining redress. It would seem very inconsistent with these principles to dismiss his suit, and leave him to commence *de novo* elsewhere; because the tribunal so long (through negligence or error) improperly closed against him, is at last open and ready to hear his complaint, and I feel myself compelled under the law and practice of this Court to decline to do so.

The next question is in what way am I to ascertain the amount of compensation. "There is no doubt," says Lord Eldon, "that according to the constitution of the Court of Chancery, it may take upon it the decision of every fact upon the record. But the ordinary course (when the matter of fact in dispute is such as the judge finds it inconvenient to decide himself) is to direct an issue to a court of law to try the fact, or to retain the bill with liberty to the party to bring an action, or refer it to the Master to make the enquiries." Now the peculiar ground on which the petitioner's right to damages is founded is not a subject for an action at law. And it would, I think, be

difficult to frame a feigned issue to be tried in the Supreme Court, which would comprise all the heads or kinds of damages for which the petitioner may claim compensation, and if an issue were framed the delay and expense attending it renders it, I think, very ill-adapted to a case like the present. Many cases may be found where the Courts have directed an issue *quantum damnificatus* in cases for breach of covenant or the like, but there it was simply to find the amount due, but here the directions of the Act (which should as far as possible be followed) are to examine the site and assess damages due, and also benefit accruing from the work. A reference to the Master cannot be made, as the only two acting masters are Mr. Longworth, who conducts the case for the Government, and Mr. Haviland, who is the brother-in-law of the petitioner, and I therefore find myself placed in a position of unusual difficulty. It occurred to me at one time that I might retain the petition and direct the petitioner to apply to the appraisers to assess the compensation and report to this Court. But the appraisers would then exercise a sort of mongrel jurisdiction which might give rise to many legal questions through which I do not see my way, and occasion trouble and delay which both the Government and the petitioner desire to avoid. Besides, I think there is much weight in Mr. Hodgson's argument that the appraisers who, under the Railway Act, are to find the compensation are appointed by the Government itself, who is the party interested in getting the land as cheaply as possible. Mr. Angell in his work on Watercourses, 656, in treating of the provisions for ascertaining the indemnity under the exercise of the right of eminent domain, says, "whenever the Legislature assumes to authorize the taking of private property they are not solely to judge of the value of the equivalent. This can be constitutionally ascertained only in three modes, first, by the parties, that is by stipulation between the legislature and the proprietor; secondly, by com-

missioners mutually elected by the parties, and, thirdly, by the intervention of a jury, or other mode equally equitable. The two first modes approximate to an ordinary bargain, and the will of the parties whose interests are affected, or that of their agents is exercised. The last mentioned mode, the intervention of a jury, etc., is resorted to when it is supposed the parties will be unable to agree; and here is the important constitutional guard, and the proper restraint upon the exercise of legislative authority on such occasions. In one of the cases just cited it was held that an act of the State of Pennsylvania, by which a 'board of property' were to decide upon the value of the land to be taken, without the participation of the party or the interposition of a jury, was unconstitutional and void. But the damages in such cases may be assessed in any equitable and fair mode to be provided by law without the intervention of a jury, inasmuch as trial by jury is only required in issues of fact in civil and criminal cases in Courts of justice."

I am aware that the legislative power of state legislatures is limited by the constitution, and I do not wish to be understood by the quotation I have made as expressing an opinion that this Act is void, yet it is obvious that the mode for ascertaining compensation it adopts is, in principle, open to this objection. And although I have no doubt that the Government are desirous that a fair and equitable compensation should be awarded to the petitioner, and that the board of Government appraisers would make just as fair and equitable an award in this case as those to whom I shall refer it; yet where it is plain that the powers conferred by the Act want the guards usually interposed to prevent their being manipulated to the detriment of either public or private interests, I think that (even if it were clear I had the power) I ought not by my decision in this case to furnish a precedent which it might be very improper to follow in others. Under these circumstances I propose to follow,

as far as can be done, the provisions of the Act, by directing a commission, under the seal of this Court, to five persons, directing them to assess the amount of compensation and return their proceedings in the usual manner to this Court, and thereupon it will be open to either party, if dissatisfied, to take exception to the commissioners' return in the same manner as to a Master's report. But as the subject of railway compensation is rather novel here, it will be necessary to give some special directions to guide the assessors, and as explanatory of these directions it may be advisable briefly to advert to some of the leading principles which appraisers generally must observe in discharging their duty under the Act.

Lord Westbury, in *Ricket v. Directors of Metropolitan Railway Company* (1), says in the beginning of railway legislation parliament, while conferring on railway companies extraordinary powers over private property, felt the justice of imposing upon the companies the obligation of making the fullest compensation for all property taken, and for all damages sustained by individuals through the exercise of such powers, and the same principle is laid down in numberless cases both by English and American Courts. Thus Mr. Angell says, "the value of land taken for public use is not restricted to its agricultural or productive qualities, but inquiry should be made as to all other legitimate purposes to which property could be appropriated, and a just compensation cannot be less than the owner of the property has sustained, and in the assessment of damages for crossing land by a railroad the jury must consider the depreciation in value of the adjacent portions of the same tract by the proximity of the railroad, either for agricultural purposes or for the sale as building lots." Again, the value of the land must be its value at the time it was entered on and appropriated by the commissioners for railway purposes. It may not have been worth half as much a month before, nevertheless the

(1) L. R. 2 H. L. 175.

owner is entitled to receive the value of the land on the day it was appropriated. By the 22nd section of the Act it is directed that the appraisers in assessing damages shall take into consideration the benefit likely to accrue to the owner from a railway running near or through his land, and the damages shall be reduced or extinguished accordingly. Now the benefit or advantages which the appraisers are to consider and allow as a set off against the damages to which the proprietor is entitled, must be such only as peculiarly affect the identical piece of land whereof a portion is taken, and not any general benefit or increase of value received by such land in common with that part of the country or town at large, or neighborhood. The only other point necessary to be observed on, and which was urged in argument by the Attorney-General, is the statement in the answer, as follows:—"And this defendant further submits to the consideration of this court that while the tribunal so specially provided by the said act remains open to the said petitioner it is not consistent with the dictates of equity and good conscience that the petitioner should call to his aid the high powers of this court and by his acts and proceedings herein causing to be arrested a work of great magnitude and thereby involving consequences of a most serious nature to the interest of the government and people of this Island, as well as to the said defendant Schreiber. This raises the question whether the element of public convenience can be set up to debar an individual from the relief to which (but for that) he would be entitled. I do not say that no case can arise, (although it is difficult to imagine one) in which it may; but it does seem most extraordinary to say, that where a party has a right to relief which this court ought, under ordinary circumstances, to grant, any public inconvenience arising from stoppage of public works until a compensation due him is ascertained or paid should be allowed to prevail against him. *Raphael v. Thames Valley Railway*

Company, (1) seems decisive on this point. There a similar question was raised and specific performance refused by the Vice Chancellor on that ground, but on appeal the Lord Chancellor reversed the decision of the Vice Chancellor and held that the plaintiff was entitled to specific performance, and that the company could not set up the inconvenience to the public by the interference with the traffic as a reason for not performing their agreement. But there is no danger of any such inconvenience here, as the granting or with-holding an injunction is always discretionary with the court, and it will not be granted so as to interrupt important works of a public nature, unless justice to individuals renders it necessary. Besides there is a distinction between acts granting compulsory powers to a company of private adventurers and to a government, the former will be restrained from using land taken until compensation is paid or secured; but the latter (unless where valuable buildings are affected) will not, as government is presumed ready to pay as soon as the amount of compensation is ascertained. No injunction therefore can issue in this case unless the government should decline to pay the amount finally decreed to be paid to the petitioner, when his lien for compensation may be enforced by injunction. *Munns v. Isle of Wight Railway Company* (2).

(1) L. R. 2 Eq. 37 & 2 Ch. (2) L. R. 5 Ch. App. 414.
App. 147.

JANE COX AND OTHERS v. THOMAS MURPHY.

SAME v. MICHAEL RICE.

Sheriff's poundage.

Under the P. E. Island Statute, 16 Geo. 3, cap. 1. the sheriff is allowed poundage "for levying, paying and receiving" moneys under executions. Under this provision he must not only levy, but actually sell, receive and pay over the purchase money before he is entitled to poundage.

IN CHAMBERS.

12th September, 1872.

HENSLEY J. These were cases of taxation of sheriff's costs on levy under statute executions on the lands of the defendants which were seized and advertized for sale and appraised, but a compromise in each case having been effected, no sale by the sheriff took place. The disputed items in the bills relate, first, to the charge for travelling to levy, and second, the charge for poundage. It is admitted upon both sides that the executions were issued and the lands levied upon previous to 19th April, 1870, and that therefore the provisions of the 4th section of the statute of P. E. Island, 33 Vic., cap 21, declaring that after the passing of that Act, it should not be necessary for the sheriff holding an execution to travel to the lands on which he may be directed to levy for the purpose of levying thereon, do not apply to either of these cases. The Land Assessment Act 11 Vic., cap. 7, sect. 9, contains a similar provision, dispensing with the necessity of attending in relation to writs of execution issued thereunder against lands in arrear, but the several acts relating to the recovery of their debts by creditors out of the lands of their debtors, under the provisions of which the statute executions in these cases were issued, contain no such enactments. I therefore think that the sheriff having actually made a levy and travelled expressly for that purpose (see affidavits) is entitled to his charge for mileage in that respect and I allow it accordingly.

As regards the second item in dispute, the words of the Island Act 16, Geo. 3, cap 1, governing it provides that “for levying, paying and receiving,” the sheriff is entitled to poundage and I think he must not only have levied on the land but actually sold it and received and paid over the purchase money before he can be entitled to poundage. The case of *Cresswell v. Hunt*, (1) in which judgment was given in this Court in Hilary Term, 1862, decides that a sheriff levying on land under execution is not entitled to poundage if the debt be paid to the plaintiff before sale, and in these cases the lands having been conveyed to the plaintiff by way of compromise before sale by the sheriff, the same rule in my opinion applies. I have therefore disallowed the charge made by the sheriff in each case for poundage.

(1) Ante p. 191.

signed by the commissioner of public lands and by W. H. Pope, Theoph. DesBrisay and G. E. Norton. This deed recites that the tenants on Lot 66, had refused to attorn, and for the defence it is contended that this recital is sufficient evidence of the refusal to attorn. This deed, however, was not signed by Joseph Pope. But it appears that the Attorney-General objected to the execution of it until W. H. Pope produced his power of attorney to sign for Joseph Pope, and it was as appears from the evidence of W. H. Pope agreed that he should on Monday, the 16th December, produce such power, but he did not nor was the deed ever delivered, but on Monday an objection was made by the plaintiff's counsel that the commissioner of public lands had no power to re-convey. I do not allude to subsequent proceedings under a subsequent act, as it can have no effect on the question, whether by the recital in this, the parties have furnished this evidence against themselves.

A deed is of no validity without delivery and delivery is a question of intention. Sheppard p. 54, says "delivery is either actual *i. e.* by doing something and saying nothing or else verbal, saying something and doing nothing." Here nothing of either kind was done. The document was, therefore, no deed as there was no intention to deliver it, and therefore in my opinion the recital is as insufficient as evidence against the plaintiffs, as the deed is to pass the estate to them. In *Thompson v. Leach* (1), it was held that where there had been a surrender, though formally executed by some parties, if not agreed to by the surrenderer, it did not operate as to him. Besides how can Joseph Pope be bound by a recital in a document which was never signed by him or by any one on his behalf? And even supposing W. H. Pope had signed as the agent of Joseph Pope, the only evidence of his agency is that in his evidence he says he had a power of attorney to sign deeds

(1) 2 Vent. 198.

for him. Suppose he had, that would not authorize him to cancel this agreement with respect to Lot 66, *vide Xenos v. Wickham* (1). Therefore in the absence of any evidence to prove that the tenants on Lot 66 refused to attorn, I think the plaintiff entitled to the whole £3151.2.8, the amount agreed to by the parties as the balance of principal remaining due to the plaintiffs if no deductions are to be made.

As to the interest, the plaintiffs contend that although by the agreement five per cent. interest was to be allowed on the balance until the two years expired, they are entitled to six per cent. after that period. But the plaintiffs have themselves been guilty of great laches. They might have brought their suit to a hearing in six or eight months, instead of which they have allowed seventeen years to pass without doing anything. It is a principle of this Court that parties guilty of negligence are not entitled to any favor, and therefore, I think, the agreed rate of interest is all that should be allowed.

(1) L. R. 2 H. L. 296.

**DONALD RAMSAY, APPELLANT. V. HERBERT BELL,
RESPONDENT.**

Trover—Carrier—Liability for loss of article in custody of passenger.

Ramsay had been employed by the promoters of a political demonstration to drive Bell and others to a reception meeting, but had not been hired by his passengers. He drove them to the meeting, left them there and his engagement being at an end went away. Bell had a plaid with him in the carriage and left it there. The plaid was not marked, and next day Ramsay not knowing to whom it belonged took it to the person who had employed him to be delivered to the owner, but it never was delivered and was lost. Bell subsequently applied to Ramsay for it, but was received with abusive language. Bell brought an action of trover in the Small Debt Court and recovered judgment, from which Ramsay appealed. For appellant it was contended (1) that he was not a carrier chargeable with the custody of the plaid, having received no hire from Bell, and the plaid not having been placed in his charge. (2) That if any action would lie against him it was not trover.

Held, (Hensley, J.) That Ramsay was not chargeable as a common carrier, and, even if he was, the plaid being an article of personal wear, and not given into his custody, did not come within the description of articles for which he would have been responsible.

2. That if he was a carrier quoad the plaid, the remedy, no conversion being shown, was case not trover.
3. That appellant was at most a bailee by finding, and as such was not guilty of any culpable negligence.

APPEAL from the Small Debt Court.

Mr. McLeod and Mr. Hodgson for appellant.

Mr. Davies for respondent.

29th October, 1872.

HENSLEY, J. This is an appeal by Donald Ramsay, from a judgment given against him at the suit of Herbert Bell, by the Court of Commissioners for the recovery of small debts at Alberton, in an action of trover for detaining a plaid of the value of £2.10, for which amount judgment was given.

It appeared that at the close of the legislative session of 1870, Bell, the plaintiff, was on his way home in company with Mr. Howlan, Mr. Reid, and Mr. Perry, three other members of the Legislature, who had all, as well as Mr. Bell, been warm supporters and advocates of the Act then recently passed providing for the construction of a railway from Charlottetown to Summerside and Alberton.

The people of this latter place and in the vicinity, who were all constituents of Mr. Bell and the other gentlemen who accompanied him, wishing to testify their joy at the passing of the measure, determined to give their representatives a public reception, and accordingly one of them, Mr. McGilveray, who was also a clerk of Mr. Howlan, engaged Ramsay, the appellant, to drive a wagon with four horses and to meet Mr. Bell and the other gentlemen at Cascumpec on their way home and drive them to Alberton. For this service McGilveray agreed to pay Ramsay 10s. Accordingly Ramsay drove the horses and wagon (which was his own) and met the party at Cascumpec and drove them to Alberton, where he set them all down at the Public Hall. It did not appear in evidence that he took the luggage of the passengers with him, or was requested to do so, but simply the individuals themselves. But this fact is not material as regards the conclusion at which I have arrived in this case. They were driven to the Masonic Hall, Alberton, where they made speeches to the assembled people, and there Ramsay parted with them and left them to proceed further as they chose. Mr. Bell's residence was at Alberton. It appeared that Mr. Bell had a plaid with him which he states he left in the carriage, thinking Ramsay was going to drive him home, but it does not appear that Ramsay engaged to do this; neither does it appear that Mr. Bell gave the plaid in charge to Ramsay when he quitted the vehicle, or that there was any mark upon it indicating to whom it belonged. Ramsay testified that on the following morning he found a plaid in his wagon, and took it up to

McGilveray, who had employed him, at Mr. Howlan's store, and not knowing to whom it belonged, after making some enquiries at Mr. Reid's without success as to its owner, finally left it in Mr. Howlan's store with McGilveray, stating that "he would leave it there and he (McGilveray) could give it to Mr. Howlan or whom else it belonged to." In cross-examination Ramsay said he could not swear whether he gave it into McGilveray's hand or put it down on the counter. A few day's afterwards Joseph Dyer, Mr. Bell's clerk, was sent to Ramsay to enquire about the plaid. Ramsay said he had left it at Howlan's, and they both went over to Howlan's but could not then find it there. They saw John McLellan, who said he never saw anything about the plaid.

Some considerable time afterwards Mr. Bell himself applied to Ramsay, who made use of abusive language, which it is unnecessary to repeat, but gave him no satisfaction about the plaid.

Ramsay swore that he never saw the plaid after he left it at Howlan's, and did not know where it was.

It was argued on behalf of the appellant that he was not, on the occasion in question, a carrier chargeable with the custody of the plaid, as he received no hire or reward from Bell, nor was the plaid placed in his custody; and secondly, that if any action lay against him trover would not, and that the action was misconceived. I hold that, as between the parties to the suit, Ramsay was not a common carrier, or chargeable to Bell as such. It is true that he was paid by McGilveray for driving the horses on the occasion, and between them duties and liabilities arose, but the undertaking, so far as Bell and his colleagues were concerned, was a gratuitous and complimentary conveyance of the parties' persons only. It does not appear that any personal luggage was taken into the vehicle, or that Ramsay assumed any responsibility respecting it. Moreover, the plaid for which the present action is brought is a garment of personal use worn by Mr. Bell himself,

and as such, like an overcoat, supposed to be in the care and custody of the owner, and even where it is the case of a carrier or coachman carrier for hire, his liability does not extend to their care and custody unless especially delivered to and received by him. It has been decided by Chief Justice Nelson in the case of *Towers v. The Utica & S. Railway Company* (1), where an action was brought by a passenger to charge a railway company as common carriers for the loss of an overcoat belonging to a passenger, and it appeared that the coat was not delivered to the defendants, but that the passenger having placed it on the seat of the car in which he sat, forgot to take it with him when he left and it was afterwards stolen, that the defendants were not liable. Chief Justice Nelson said the overcoat was not delivered into the possession or custody of the defendants, which is essential to their liability as carriers. Being an article of wearing apparel of present use in the care and keeping of the traveller himself for that purpose, the defendants have a right to say that it shall be regarded in the same light as if it had been upon his person. No carrier, however discreet and vigilant would think of turning his attention to property of the passenger in the situation of the article in question, or imagine that any responsibility attached to him in respect of it. The fact that Ramsay found the plaid in the wagon afterwards did not make his responsibility, in my opinion, any greater than that of a mere bailee by finding, and as such only would he be liable.

Story on Bailments, p. 91, cites from an old work the following doctrine:—"If a man finds goods of another, if they be afterwards hurt by wilful negligence he shall be charged to the owner. But if they be lost by other casualty, as if they be laid in a house that by chance is burned, or if he deliver them to another to keep that runneth away with them, I think he is discharged."

(1) 7 Hill (N. Y.) 47.

In 1 Bac. Abridgt. D. Bailment, it is laid down:—"If a man find goods and abuses them or if he find sheep and kills them, this is a conversion. But if he finds goods and lose them again, no action lies."

The reason of this distinction is thus stated:—"Where a man only finds the goods of another, the owner did not part with them under the caution of any trust or engagement, nor did the finder receive them into his possession under any obligation," and therefore the law only prohibits a man in this case from making an improper profit of what is anothers. But the finder is not obliged to preserve these goods safer than the owner himself did, for there is no reason for the law to lay such a duty on the finder on behalf of the careless owner. It is therefore, a good means to punish an injurious act, namely the conversion of the goods to his own use but not to punish a negligence in him, when the the owner is guilty of a much greater one.

In *Vandrink and Archer's case* (1), Anderson J. said: "If a man find goods and lose them after or they be taken from him, he shall not be charged for he is not bound to keep them, and Lord Coke in *Isaac v. Clark* (2), declared that if a man find goods an action of the case lies for his ill and negligent keeping of them but not trover or conversion, therefore this is a mere non-feasance.

And in Comyn's Digest, Trover E. the following is laid down:—"If a man find a thing and useth it, he is answerable, for this is a conversion, but for negligent keeping no law punisheth him, and to that effect are many other decisions, and this view of the case is supported by *Ross v. Johnson* (3) and the doctrine as cited from 2 Hilliard on Torts 110.

On a review of all the cases and the facts in evidence at the hearing of this appeal, I am of opinion that (1st) Ramsay was not chargeable on the occasion in any respect

(1) Leon. 221, Case 304.

(3) 5 Burr. 2825.

(2) 2 Bulstrode 306.

as a common carrier. (2nd) That if he was a common carrier as regards Mr. Bell and his luggage on the occasion in question, the plaid being an article of personal wear does not come within the description of the articles for which Ramsay would have been responsible; in addition to which is the fact that it had no mark denoting to whom it belonged, and that it was never given into Ramsay's custody. (3rd) That if he was a carrier quoad the plaid, the remedy, as no actual conversion was proved and at most it only amounted to a loss, was case, not trover. (4th) That holding him in reality to be only a bailee by finding, I consider he was not guilty of any culpable negligence, and did quite as much to restore it to and find out the owner as the law in such a position required him to do, and that if unfortunately a loss occurred he is not liable to Mr. Bell, who was himself a careless owner.

It was suggested at the hearing that Ramsay had purposely kept the plaid out of Mr. Bell's sight and on account of ill-feeling between them had tried to make a fool of Mr. Bell in the matter. If there had been any real evidence of this and any proof that Ramsay had designedly hid away the plaid from Mr. Bell, or passed it from hand to hand to keep him from getting it, I should have held such an act to be a conversion, but there was no evidence at all of this and by the facts proved and by those only, and not by suspicion which may be entirely groundless can I be guided in this case.

I consider that I am legally bound in this case to reverse the judgment below with costs, which accordingly I now do, and my conviction is that this decision meets not only the legal requirements but also the equities of the matter in dispute between the parties.

D. CAMPBELL, NEIL CAMPBELL AND MICHAEL CAMPBELL,
APPELLANTS V. DONALD MCINTOSH, RESPONDENT.

NEIL CAMPBELL, APPELLANT V. ANGUS McDONALD,
RESPONDENT.

NEIL CAMPBELL, APPELLANT V. ALEXANDER McDONALD,
RESPONDENT.

*Affinity of one of several J. P.'s trying cause to party is ground
for setting aside their judgment.*

These were appeals from judgments of four J. P.'s fining appellants in assault cases. One of the magistrates was married to a first cousin of D. McIntosh, the respondent in one of the cases. The respondents in the other cases at the time of the alleged assault, were not themselves of affinity to any of the magistrates but were acting as servants of D. McIntosh. Objection was taken to the convictions on the ground of D. McIntosh's affinity to one of the magistrates.

Held, (Hensley, J.) That this objection was fatal, and the convictions must be set aside, and that no distinction could be made between the case of D. McIntosh and those of his servants, but that the convictions in their cases must be set aside on the same ground

APPEAL from conviction before Justices of the Peace.

C. Palmer, Q. C., and Mr. McLeod for appellants.

Mr. Hodgson and Mr. Davies for respondents.

10th December, 1872.

HENSLEY, J. These three appeal cases came on for hearing at Georgetown at the last July Term. In each of them the respondents were plaintiffs in the Court below, and the appellants were severally defendants, and the judgments appealed from were in each case for a fine on the defendants for assaults and batteries upon the plaintiffs. The causes were tried at Souris before certain magistrates for Kings County, not named in the appeal papers, which were entitled as "In the Magistrates' Court of Souris, in King's County," which Court in fact has no real existence. A parallel jury cause involving precisely the same facts (*McIntosh v. Campbell and others*) having

been heard at great length, and some fifty witnesses examined during the same term, it was agreed that the Court should take the evidence therein given as the evidence on which to determine the merits of the appeals, and the only evidence given in addition to this was that of John Knight, Michael McCormack and Donald L. McDonald, as to the names of the magistrates who tried the original causes, whose testimony unitedly shewed that the following magistrates adjudicated at the original hearing, viz., John Knight, Charles McEachern, Donald H. McDonald and James Keefe, and that one of them, Donald H. McDonald, was married to a daughter of Angus McIntosh, brother of John McIntosh, who is the father of one of the respondents, Donald McIntosh, and consequently that the wife of Donald H. McDonald, one of the trying magistrates, is a first cousin of Donald McIntosh, the respondent. Several technical objections were previously taken by respondent's counsel to the form of the appeal papers in each case.

1st. To the title of the Court as set forth at the head of the several affidavits and recognizances of appeal being, as already stated, as "In the Magistrate's Court of Souris, in King's County," and not as it was alleged it should have been in accordance with the law and the forms prescribed by the statute, viz., "Before John Knight, Charles McEachern, James Keefe and Donald H. McDonald, Justices of the Peace for King's County." I consider, however, that it was not competent for the respondents to raise this objection, inasmuch as on examining the appeal papers on the files of the Court it appears that the original judgments or convictions in their own favor were entitled in precisely the same manner. The appeal papers must necessarily have been entitled in the same way as the judgments or convictions appealed from, whether the title was right or wrong. The respondents therefore can take nothing by this first objection.

2nd. The second objection to the appeal papers related to one of the appeals only, viz., that of Donald McIntosh, respondent, and Donald Campbell, Neil Campbell and Michael Campbell, appellants, and was that the recognizance being in the three joint names throughout was informal and insufficient, inasmuch as it would be of no avail in case of the acquittal of one or two of the appellants, and the conviction of the other or others, and that it ought to have been joint and several, or in such a shape as to cover the possible conviction of one party and the acquittal of others.

This objection I consider to be of no force as a preliminary one, for in case of a general conviction of all, and in the first instance I could presume nothing else, the terms made use of would be sufficient, the words "that if they the said A. B. C. D. and E. F. be condemned in the appeal they will pay the costs and condemnation money or they will render themselves, etc., means that each of them will render himself to the custody of the sheriff," and a neglect by any one of them to do so would be a full breach of that part of the recognizance, and again the clause "if they fraudulently part with any of their goods," means also "if either of them parts with any of his goods fraudulently," and in case of a general conviction the parting fraudulently with goods by any one of them would be a full breach of that part of the recognizance. I therefore hold that this second objection is not good as a preliminary one.

Objection was then taken on behalf of appellants to two of the magistrates who tried the original causes.

1st. To Mr. Knight on the ground of interest because it was alleged that he held mortgages from A. McIntosh, Parker Whitty and Anthony McPhee, of lands involving the same questions of boundary and title as the lands of John and Andrew McIntosh, respecting which the dispute out of which the assaults arose originated.

There was no sufficient proof however of this allegation in as much as Mr. Knight who alone gave testimony on this point although he stated that he held mortgages from these parties did not produce them and stated that he could not state what lands were included in his mortgages.

2nd. Objection was taken to the convictions on account of Donald H. McDonald, having as already stated married the first cousin of Donald McIntosh, one of the respondents and that therefore the conviction was bad on account of his affinity to McIntosh.

There can be no doubt that this is a fatal objection and that on this latter account the convictions must be declared void and be set aside.

Again and again not only in this Island but in Great Britain have the Courts set aside proceedings of tribunals because an individual who had an interest in a cause or was of affinity to either party took a part in the decision and it is of the last importance that the doctrine that no man shall be a judge in such cases should be held sacred unless expressly and solemnly waived by the parties which alone can cure such a defect. It may perhaps be alleged in this case that as four magistrates sat in these cases and were unanimous in their decision, the fact of one only of the four being incompetent should not invalidate the conviction as there would still be a sufficient majority to affirm the decision. But it was laid down by Lord Denman in the case of *The Queen v. Paving Commissioners of Cheltenham* (1) that the superior courts will not enter into the question of polling or discussing on which side the interested party voted, because the court being improperly constituted could not legally take any step, but hold the constitution of a court bad where it has one disqualified member sitting with the others and adjudicating in a cause.

I must therefore and particularly in the absence of any proof of knowledge on the part of the Campbells of D.

(1) 1 Q. B. 467.

H. McDonald's interest at the time of the trial before the magistrates or of their assent to his sitting in the case hold the conviction in the case of *Donald McIntosh v. Neil Campbell, Michael Campbell and Donald Campbell*, bad and set it aside.

In the other cases of Angus and Alexander McDonald, respondents, although there is no proof that they or either of them are of affinity to Donald H. McDonald yet as the evidence shows that when the assaults complained of took place they were acting as the servants of Donald McIntosh engaged in carrying out the same objects and coming into collision with the appellants at the same time and under similar circumstances I can draw no distinction between their cases and that of Donald McIntosh and therefore on the same ground set aside the convictions in these cases also.

Although under these circumstances, as regards D. H. McDonald's affinity to the respondent Donald McIntosh, I am unable to affirm the judgments given below yet as I find that the original warrants were issued by Mr. Knight who was not interested and who had it therefore in his power to a great extent to appoint the magistrates who should be associated with him and this not being a case of a single magistrate only for corrupt or interested purposes having sole control of the case I order that each party pay his or their own costs of the several appeals and also in the original proceedings and suits before the magistrates in each case.

WILLIAM HEARD AND I. C. HALL v. THE MARINE
INSURANCE COMPANY.

*Marine Insurance—Voyage partly accomplished—Freight pro
rata—Salvage*

The vessel in this case was owned by Heard, and the cargo by Heard and Hall jointly. The cargo was insured from Charlottetown to Cuba. The vessel and cargo having received sea damage put into Halifax where the master sold the cargo for the benefit of all concerned, and the proceeds of sale were received by plaintiffs who, under the head of salvage, claimed to retain therefrom freight *pro rata* to Halifax. The jury found damages for plaintiffs to the full amount of their claim, and defendants moved to reduce the amount of damages found. The question was whether the owners of the goods on adjustment could make this salvage charge against the underwriters.

Held. (Peters, J.; Hensley, J. concurring) That the owners could not charge the underwriters, and that the damages must be reduced.

MOTION to reduce damages found by the jury for plaintiffs.

10th December, 1872.

Mr. Davies shews cause.

C. Palmer, Q. C., and Haviland, Q. C., *contra*.

Cur. ad. vult.

15th January, 1873.

PETERS J. This was an action on a policy of insurance. The vessel was owned by the plaintiff Heard and the cargo was the joint property of Heard and his co-plaintiff Hall, and was insured (valued at £1000) from Charlottetown to Cuba. The vessel and cargo having received sea-damage put into Halifax; the cargo was landed and sold by the master for the benefit of all concerned, the proceeds of the sale amounting to £ have been received by the plaintiffs, who under the head of salvage expenses claim to retain from the proceeds freight *pro rata* to Halifax, and the question is whether the owners of the goods can on adjustment charge the underwriters with this item.

The rules which govern questions of this kind appear to be these: where a vessel is wrecked or injured and the cargo or some part of it saved, it is the duty of the master, either in the same or another vessel to send on the goods to their destination, with all practicable expedition, and by so doing he entitles himself to full freight. If the freighter refuse to allow them to be sent on, the ship-owner is entitled to the whole freight, because he thereby releases the ship-owner from further performance of the contract; but if the freighter declines to take them or to give any directions concerning them, then by the rigor of the English law, however much of the service may have been accomplished, and however near the goods may have been brought to their destination no freight can be recovered. In this respect the English law differs from the rule of the general maritime law in other countries; by which when goods are not entirely lost and a portion of the voyage has been performed, freight becomes payable *pro rata*, *i. e.* in proportion of what has been accomplished. The reason for the English law thus differing seems to be this; by the rules of common law there can be no obligation without a contract express or implied upon the express contract (*i. e.* to carry the goods from A. to B.), no right accrues, because the condition has not been fulfilled, and no substituted contract can be implied, where the freighter by his conduct in refusing to take the goods or to give directions concerning them, evinces that he has derived no benefit from it. But it was argued that as the damaged state of the goods rendered a sale necessary, the sale was for the shipper's benefit, and that in such circumstances the master must be considered to have an implied authority to agree with the ship-owners to receive the goods and pay freight *pro rata*, and that this state of facts was sufficient evidence of an implied new contract between the ship-owner and the plaintiffs. No doubt this is the

doctrine of *Luke v. Lyde* (1), *Lutwidge v. Grey* (2), and a number of American decisions as well as text writers. But this doctrine is quite over-ruled by *Vlierboom v. Chapman* (3) where Parke B. says:—"The rule may be shortly related to be this, that to justify the claim of freight *pro rata* there must be a voluntary acceptance of the goods at an intermediate port, in such a mode as to raise a fair inference that the further carriage of the goods was intentionally dispensed with," and he says, it is difficult to conceive a case in which a master (in making a sale from necessity) can be presumed to act as agent for the shipper, "for the agency of the master from necessity arises from his total inability to carry the goods to the place of destination which dispenses with the performance of that primary duty altogether, and with the right to freight *pro rata*, from the presumed waiver on the part of the shipper of the performance of a duty which the master was ready to execute." And in the American note to this case it is said:—"Thus no freight will be due where the voyage is interrupted by capture and the goods accepted on redelivery by a prize court. Nor where the facts show that the goods could not have been carried on, or without disproportionate expense, and thus negative a voluntary acceptance." In this case the jury have found that they could not have been carried on without such disproportionate expense, or they could not have found a constructive total loss. This doctrine is confirmed by Dr. Lushington in his judgment in the case of *The Soblomstein* (4). He says, "by the British law the following points seem settled:—

First, that upon the vessel becoming disabled at an intermediate port, the master is allowed a reasonable

(1) 2 Burr. 883.

(3) 13 M. & W. 230.

(2) Cited in *Luke v. Lyde*,
Ab. on Ship. 307, and
McLauchlin (2nd Ed.)
on Ship. 446.

(4) L. R. 1 Ad. & Ec. 293.

time within which to reship or tranship, so as to earn his freight.

Secondly, that the whole freight is payable, if by default of the owner of the cargo, the master is prevented from forwarding the cargo from the intermediate port to its destination. *Cargo ex Galem* (1).

Third, that no freight is payable, if the owner of the cargo against his will is compelled to take the cargo at an intermediate port.

Fourth, that to justify a claim for *pro rata* freight, there must be a voluntary acceptance of the goods by their owner at an intermediate port in such a mode as to raise a fair inference that the further carriage of the goods was dispensed with. *Vlierboom v. Chapman* (2).

Some decisions in the Admiralty Court apparently conflicting with the doctrine of the cases I have alluded to were cited on the argument; but it must be remembered that in dealing with cases of this kind the Admiralty Court frequently assumes an equitable jurisdiction of granting or withholding freight, and in such proportions and on such terms as may seem warranted by the circumstances, and therefore many of these decisions are of no weight here, being founded upon principles which a Court of Common Law may not adopt. But assuming that the shippers were liable for freight *pro rata*, that would not entitle them to throw the payment of that freight on the underwriters. In *Bailie v. Moudigliani* (3), the leading case on this point, the plaintiff, the common agent, paid to the owners of the ship freight *pro rata*, and the question was whether he was to be reimbursed by the owners of the goods, or whether it was a loss within the policy for which the underwriters were liable. The Court held that the freight *pro rata* was due, on which point the decision would not now be upheld, but Lord Mansfield said, "as between the insured and the underwriters upon

(1) B. & Lush. 167; S. C. 2 (2) 13 M. & W. 230.
Moo. P. C. N. S. 216 (3) Park Ins. 116

the cargo it is a contract of indemnity, and the latter have nothing to do with the freight. The owner of the ship has a lien for his freight, but in the case of a loss total as between the insurer and insured, with salvage, the owner may either take the part saved or abandoned, but in neither case can he throw the freight on the underwriters, because they have not engaged to indemnify him against it and have nothing to do with it." And this decision as to the non-liability of the underwriters was followed by Mr. Justice Story in *Cage v. Baltimore Insurance Companies*, and in *Columbia Insurance Companies, v. Collett* (1). It is true Messrs. Phillips and Benecke lay it down that they are liable, but beyond their own opinion there appears nothing to support their proposition, while in Mr. Justice Shee's late edition of Marshall on Insurance, page 396, it is laid down that underwriters on goods are in no case liable for freight, and *Bailie v. Moudigliani* (2), is cited as authority for the position. If we look at the facts there is nothing to warrant the inference of a new contract between the shipowners and insurers. On the contrary the underwriters when applied to by Heard refused to give any advice or to have anything to do with the sale of the goods. After this Heard, the insurer of the ship and part-owner of the goods, went to Halifax and arrived there before and was present at the sale. It is true that the same rules of law apply where the ship and cargo are owned by one person as when they are owned by different persons, but there can in fact be no such thing as the same person being bargainor and bargainee, and thereby making a bargain with himself, and certainly not so as to affect the rights or impose liabilities on third persons not privy to such fancied contract. Here Heard was present at the sale. The policy covered the full value of the goods. If Heard as owner of the ship had wished to insure his freight he might have done so, but he did not. Assuming that the ship was entitled to *pro rata*

(1) 12 Wheaton, 383.

(2) 1 Park. Ins. 116.

freight, as owner of the goods he must have paid the freight due in respect of his moiety of the goods to himself, but however that might satisfy a legal theory; it would not put any money in Mr. Heard's pocket, and he would still lose the freight. To avoid this we are to presume that his master pays him the freight, or Mr. Heard receives the salvage and deducts the freight from it, and we are asked from this to imply a new contract so as to make the underwriters liable for a loss which he never paid them a premium to indemnify him against. A claim having less law, reason or justice to support it could scarcely be presented to a Court.

The rule to reduce the damages must be made absolute.

Hensley, J., concurred.

IN CHANCERY.

GEORGE W. DEBLOIS v. THE QUEEN.

Railway damages—Compensation for severance of lands.

Petitioner excepted to the report of commissioners appointed by the Court (ante p.) to ascertain the amount of compensation due him in respect of lands taken for railway purposes, on the ground that the amount awarded was too small. The land taken severed his remaining lands. The Railway Act provided for a fence being built along the railway and maintained by Government, but made no provision for permitting the person whose lands were severed a crossing from land on one side of the road to the other, nor for making gates, etc., and it appeared that the commissioners had not taken this into consideration in making their report. For the Crown it was contended that the road was dedicated to the public, and therefore everyone, the original owner included, had a right to cross it when and where he pleased.

- Held*, (Peters. M. R.) That the petitioner was entitled to compensation for being deprived of communication, to be estimated at the cost of providing and maintaining a crossing, gates, etc.
2. That though the land was dedicated to the public it was for a specific purpose, i. e., a railroad, and the right of the public to use it was restricted to its use as a railway.

EXCEPTION by petitioner to the report of commissioners awarding him railway damages on the ground of insufficiency.

14th September, 1872.

Mr. Hodgson for petitioner.

Longworth, Q. C., and Mr. Davies for the Crown.

Cur. ad. vult.

February, 1873.

PETERS M. R. In this case exception is taken to the report of the commissioners appointed by the Court to ascertain the compensation due to the petitioner in respect of certain lands belonging to him, taken for railway purposes, on the ground that too small a sum has been awarded to him. Upon this question, viz., the sufficiency of compensation—when the award is excepted to—I am

bound to exercise my discretion according to circumstances of the case as brought before me. But the principle I would lay down for my own guidance in such cases is this, that when I see the commissioners have considered the different heads of damage, and have exercised their judgment on them, I should be disposed to be governed by their decision, unless I find the amount clearly wrong, or that they have mistaken or misapplied a principle, or have omitted to consider heads of damage, which they should have considered. Now from the evidence it appears that the petitioner had, previously to the railway being run through his land, laid off lot 41 and parts of 52 and 53, for building lots; and it so happens that the railway takes the site intended for a street, and that his plans were thereby entirely disarranged. But it does not necessarily follow from this, that his plans for division into building lots might not, except for a construction of the Act to which I shall presently advert, have been re-adjusted without much loss to him; and there is nothing in the evidence taken before the commissioners, or in the proceedings, to shew me that the damage from this cause was not intended to be covered in the \$438, allowed for injury to the lands affected. Again, the quantity of land taken is one acre twenty-three rods, for which they allow him \$350. Now, do they mean that this is in their judgment the full market value of the land? I find evidence given before them of the prices which land sold in building lots in the immediate neighborhood brought at public sale, and from this I infer that they arrived at the value of the land taken by comparison with that of lots so sold, and that they mean \$350 is the marketable value of the land. Mr. DeBlois in his evidence also compares it with other lots sold, stating that a lot fronting on the Malpeque Road brought £235. But there is nothing in the evidence from which I can ascertain where this last mentioned piece of land was really situated. It may have fronted on the Mount

Edward Road, and therefore have been much more valuable than if situated where the railway runs about half-way between the Malpeque and Mount Edward Road, and I must infer this to have been the case, as in his cross examination he says, the property, meaning I presume the college land, as a whole, he understood brought about one hundred pounds an acre, which is just about what the commissioners allowed him. If this lot which sold for two hundred and thirty-five pounds, was really adjacent to the spot where the railway runs, it would be difficult to understand why the same value was not allowed for it and would have gone very far to convince me that the amount of three hundred and fifty dollars was a very insufficient compensation. But from the good judgment of the commissioners I have no doubt this was not the case. If it had been the plaintiff should have shown it by affidavit or other evidence on the hearing.

But then the question arises, is it a correct principle to allow only the marketable value of the land? Or should there not be added to this an amount or percentage for compulsory sale? It was urged by the plaintiff's counsel that this should be done, and a resolution of a committee of the House of Lords on the subject of compulsory sale, was pressed on my attention. It appears, *vide* Hodges on Railways, 290, that a select committee of the House of Lords, after examining a number of land valuers, railway solicitors and engineers, came to the following resolutions:—

“ With respect to the land actually taken, the witnesses who were examined state that to the marketable value of the property taken they add in their valuation a percentage on the ground of the sale being compulsory. The amount of this percentage varies with the different witnesses whose evidence will be found in the appendix, but the committee are of opinion that a very high percentage, amounting to not less than fifty per cent. on the original value ought to be given, in compensation only

for the forced sale to which the seller is bound to submit, the severance and damage being distinct considerations." And one of the witnesses, Mr. Cramp, a land valuer, says: "I have generally taken three points to fix myself to, the first point is, the fair value of the land in the neighborhood, upon which I have usually put fifty per cent. in consideration of compulsory sale, in addition to what I should call the marketable value of the land." And he then proceeds to explain how he estimates the damage for severance, which is not material to the question I am at present considering. Now without laying it down that appraisers are bound to adopt this rule, I must say it seems to me a very just one, as many persons may not desire to part with their property, and would not do so for its marketable value. Suppose a man has a horse for which he would refuse one hundred pounds, when its marketable value is only fifty, you do him I think gross wrong if you compel him to sell it for fifty, allowing nothing for compulsory sale. It is true if public necessity, as in case of war, requires the property, the law of eminent domain, to which all property is liable, authorizes its being taken; but it declares that the owner shall be fully compensated for all inconvenience he thereby sustains, which he certainly is not, unless in addition to the price he could at any time obtain in the market for it; you compensate him for the loss of the enjoyment of property which suited him, which he did not wish to part with, but of which you deprive him against his will.

In ordinary cases of taking cultivated land, I must say I would adopt this rule to its fullest extent as nothing more than simple justice to persons whose lands are taken, although there are many cases in which it would be too much. For instance, suppose you take premises in a town worth £10,000, £5,000 for compulsion in addition to full compensation for loss and inconvenience would be too much. In the present case the plaintiff had laid off his land and intended to sell it before it was taken, and

therefore in one sense, namely, the taking what he wished to keep, the sale is not compulsory, yet it is as to price, which he had no voice in fixing. And although on this account I should have allowed a smaller percentage—I should have allowed something—because in all valuations of this description no one can tell whether the just amount of compensation has been exactly ascertained. But I cannot make any allowance here, because from any evidence before me I cannot say whether the commissioners may not have included a percentage for compulsory sale in the \$450 given for damages. As to the compensation generally, the commissioners had an opportunity of examining the land taken and the other adjacent lands sold and comparing their relative values, as well as considering the injuries to the remaining lands, and had therefore much better means of forming a correct opinion on the subject than I have. And upon the whole evidence I am of opinion that there is nothing in it that ought to induce me to disturb the finding of the commissioners on this ground. But it appears to me that a head of compensation exists which they have not taken into consideration. The Railway Act, 34th Vic., cap. 4, enacts that the contractors shall build a fence along the railway which shall be maintained by the government; but it makes no provision for permitting the person whose lands are severed crossing from his land on one side of the road to that on the other, nor for gates and crossings to enable him conveniently to do so. It was argued by the Solicitor General that the road was dedicated to the public, and therefore every one had a right to use it, and the owner had a right to cross it when and where he pleased. But I cannot assent to this argument—at least in its full extent. It is true the land once taken by the commissioners becomes in the words of the Act dedicated to the public, but this dedication is for a specific purpose, namely, for a railroad, and the right of the public to use it must be restricted to a use for the purpose of trade and traffic as

a railway and for things incident thereto. Where a person has once, no matter by what means, parted with the ownership of a piece of his land he cannot continue to pass or exercise any dominion over it unless he has reserved the right to do so. Here the petitioner's land is taken from him by an Act which reserves no such right. It seems to me, to say the least of it, very doubtful whether in such a case the owner retains a right to cross at all, whether he is not in fact a trespasser if he goes on the road for any purpose without permission. I do not find this precise point raised in the English decisions, and it is scarcely possible that it should, as all the English Acts contain express provisions on the subject on which those decisions turned. In the *Grand Junction Railway v. White* (1), where trespass was brought against the owner of land severed for crossing the railroad, the counsel in arguing observed, "that it may be said to be a hardship that the land owner should have no road to his land, but the 78th section provides for all damages occasioned by the land being separated, the company having paid both for the land and the damage by severance would naturally conclude that there was no incumbrance on the land conveyed, viz., that a road was to be claimed over it by the owner." The judgment was for the defendant, but in that case the Act expressly provided that until the company made crossings the owner might cross with his cattle, etc., wherever he pleased. And Lord Abinger in giving judgment observed, "that the intention of the Act was that the railway should be made without detriment to individuals, and by it the company are bound to make communication if they do so, and if the owner of the land is dissatisfied he may go before a magistrate and get his determination as to what ought to be the proper communication; but if the company make no communication at all a party may go over the railway when he pleases." The decision turned therefore on the

(1) 8 M. & W. 214.

provisions of the Act, which manifest an intention to take care of the right of individuals, an intention which the provisions of the Island Act fail to manifest, and did not decide the point I am now considering, namely, whether where the Act is silent as to communications the owner retains the right to pass at all. The American authorities come more closely to the point.

In *Conn. & Pass. River Railway Co. v. Holton* (1), cited by Redfield, vol. I, p. 247, it was decided, "that the land owner after his land was legally appropriated for the track of a railway has no right to enter upon or use such land for any purpose which in the least degree endangers or embarrasses its use for any purpose for which the railway has appropriated it. And consequently the owner could not enter upon the land with teams to remove turf therefrom, the effect of such entry being to enhance the danger of cattle getting upon the track, and to increase the dust by the passage of cars after the sward is removed from the surface of the track, and the land owner has no right to cross the track of the company at any other point than that established on the taking of the land, nor can he build a farm crossing unless established by law. And a railway company may maintain trespass for unlawful entries or acts upon the land appropriated to their use." And the same point occurs in *Penn. Railway Co. v. Redman* (2), and the same author at page 345 says, "it seems scarcely needful to repeat what has been so often declared by the Court, that railways have the exclusive right to the possession of the road-way, and to exclude all intrusions thereon whether from persons or structures." But assuming for argument that being taken for a purpose which necessarily severs the lands of a great number of persons, it may in construing the Act be implied that the communication between the severed lands was not intended to be entirely cut off, and that the owner may therefore have an implied authority conferred

(1) 32 Vt. 47

(2) 5 Am. L. R. N. S. 49.

on him to pass over the land of which he has ceased to be owner; yet this right must be subservient to the purposes for which the land was taken. If he may cross it he must do it in such way as not to injure the track or endanger the safety of passengers. A right of crossing not subject to such restrictions would be entirely inconsistent with public safety. A loaded cart, weighing a ton, in crossing must strike an unprotected rail with a momentum of several tons weight, which if frequently repeated must tend to loosen the fastenings and displace the rail, and thus render trains liable to be thrown off the track. Again, as the statute provides that the road shall be fenced the owner must make openings through which he can pass to his land on either side of the track. Here again the restriction that the right must be so exercised as not to be incompatible with public safety, as well as a due regard to his own interests requires that gates should be placed in the openings, for should his cattle for want of them stray into the road the public safety would be endangered, and as they would be wrongfully there the owner would be liable for whatever damages the proprietors or passengers sustained through their being there, while if they are killed he would have to bear the loss. It was said in argument that by the contract for construction the contractor is bound to make crossings. Even if this is so it cannot affect the present question. The Government might release the contractors from providing crossings in many places where the owner's convenience required them, and if it did not the owner would have no legal remedy against the contractors for not doing so, as there would be no privity existing between them, nor, the statute being silent respecting crossings, could he compel the Government to provide them. And he might therefore be compelled to make them at his own expense, assuming he had a right to enter and make them at all. The costs therefore of maintaining gates, bridges,

etc., are heads of damage which should be considered and allowed for in making compensation.

The English Railway Acts, so far as I have been able to look into them, all contain express provisions securing to the owners of severed lands the right of having crossings and gates opening into the adjoining lands provided for them. Thus the 8th and 9th Vic., cap. 20, enacts that, before the company use land, it shall make crossings for the owner, and provides that if any dispute shall arise as to the kind or number of such gates or crossings, or the sufficiency thereof, the matter may be determined by two justices. So the Acts 3 & 4 William IV., cap. 34, provides that until the company provide crossings, gates, &c., it shall be lawful for the owners of the land through which the railway shall be made, with horses, cattle, &c., to pass over the railway whenever they please.

The introduction of such provisions into the English Railway Acts, seems to indicate that the owner is not there considered as retaining a right of passage, unless it is reserved by the Acts, otherwise the provisions would be unnecessary. Turning to the American authorities, I find the same doctrine upheld, for although many Courts in different states have held that where the Act is silent on the subject of crossings, the expense of making them is to be borne by the owner. Chief Justice Redfield in his valuable work on Railways, points out the unsoundness and injustice of these decisions, observing that the omission of express provisions respecting farm crossings in the Acts, was wholly the result of oversight in drawing them. His observations are so apposite to the present question, that I extract them at some length. He says, vol. 1., p. 481 :—“It is considered in the English Courts, that the expense of fences and crossings being imposed upon the railways by statute perpetually, and the mode of enforcing its performance pointed out in the statute, it has no connection with the land damages, but is enforced

under the statute ; and land damages are to be appraised upon the basis of that duty resting on the railway.

But where the statute makes no such provision the expense of fencing and making crossings are important considerations in estimating the damages for the land taken. And this expense should be borne by the company in addition to paying the value of the land ; for otherwise the land is taken without an equivalent." And in a note he cites the case of *Ryle v. A. and R. Railway*, (1) "when the Court declined to interfere by injunction to compel the building of a farm crossing, although the company assumed before the jury for assessing land damages that such crossings should be built by them, the plans showing no such crossings. It is said under such circumstances to be the duty of the land owner to make necessary crossings, and that he is a trespasser for crossing the railroad without them, and that this should be so considered in assessing damages for the land taken, and compensation made for such expense."

Here the petitioner's land is taken under the authority of an Act which makes no provision for communications, and assuming he had a right to cross at all, the authorities I have cited abundantly establish that under these circumstances the commissioners were bound to consider the cost of making crossings, gates, &c., and allow compensation therefor. From all the facts brought to my notice on the argument, it is clear that the commissioners acted on the assumption that the government were bound to make the crossings, and that in fact no compensation was awarded on that account. No blame can attach to the commissioners for this omission, as all parties acted under the same misapprehension of the construction of the Act. I am convinced that it never was really intended that owners of severed lands should be deprived of communications. Yet after all the consideration I have been able to give it, I strongly incline to the opinion, that

(1) 2 Barb. (Ch.) 489.

the Court will be compelled to hold that under this Act no right of communication remains to them.

And now comes the question, how is the additional compensation to be ascertained? *Doe dem Duke of Beaufort v. Patrick* (1), which was a question for railway compensation, where the time during which the commissioners could act had expired, the master of the rolls says:—"I am of opinion that I ought to fix the amount myself, and not send it to another tribunal to ascertain the value." I think the amount to be awarded for the construction of crossings, &c., may be easily fixed from evidence which any competent engineer can give; and I am of opinion that the only crossing the petitioner can reasonably claim, is on the road shown on the plan leading from his residence on the Malpeque Road to the Mount Edward Road; and I see no reason why, in case I find myself compelled to hold the communication entirely cut off, I should not be able to determine this question without putting the parties to the delay and expense of sending it back to the commissioners. I shall therefore require the parties to produce before me, evidence of the probable cost of erecting and maintaining a crossing, with gates, &c., as well as of the damage the petitioner will sustain by his being deprived of all communication with the lands on either side of the road, and with the Mount Edward Road. When this is done I will make a decree directing that the sum which I shall fix for additional damage, and that already awarded by the commissioners, with interest on both sums at six per cent., from the time of taking the land, be paid to the petitioner.

I am sensible of the inconvenience and trouble the construction I have put upon the Act, as to the entire cutting off communications may occasion by its operation on assessments already made, but not yet paid, and I am unwilling to decide a point of such importance without giving the counsel for the Government an opportunity of

(1) 6 Exch 498.

speaking to it again, if they desire to do so, on the hearing when the evidence I require is produced.

As a considerable time has elapsed since the argument, I may observe, that after giving the case the fullest consideration, and arriving at the conclusions I have expressed, I delayed making up my decision until I could obtain Chief Justice Redfield's work on Railways from Boston; but an attentive perusal of it only confirms the opinion I had previously formed. The inconvenience which this construction of the Act would cause was pressed on me in argument; but as to that I will only quote the words of Lord Abinger, in *Hall v. Franklin*, (1) where the inconvenience was much greater, as the decision practically invalidated all the notes held by all the joint stock banks in England. He says:—"We have been strongly pressed with the inconveniences that may result from this construction of the statute. We are not insensible to them, but the only proper effect of that argument is to make the Court cautious in forming its judgment. We cannot on that account put a forced construction on the Act of Parliament." If inconvenience is likely to result from this decision, the Legislature must do in this case what Parliament did in that—supply a remedy.

(1) 3 M. & W. 259.

WILLIAM MCGILL v. JAMES MCWADE.

Costs.

The plaintiff had obtained a verdict against the defendants, but not being satisfied with the amount had it set aside and a new trial granted on the ground of insufficiency, costs to abide the event. At the second trial he again obtained a verdict, but for a smaller amount. On taxation of costs defendant's counsel contended that he was not liable for the costs of the first trial.

Held, (Hensley, J.) That plaintiff having failed to recover a larger amount on the second trial than on the first was not entitled to the costs of the first trial.

TAXATION of costs.

Charles Palmer, Q. C., and Mr. McLeod for plaintiff.

Palmer Q. C., and Sullivan, Q. C., for defendant.

25th April, 1873.

HENSLEY J. This was the trial of an issue directed by the Court to determine the true and actual state of the accounts respecting an agreement to build a ship and otherwise between these parties. It arose out of contradictory affidavits filed in the matter of an application to "set aside or reduce the levy" upon an execution, issued on a judgment of *Wm. McGill v. John A. McDonald and Henry McWade*, who were sureties for the performance by James McWade of an agreement to build a ship for William McGill. Substantially, however, the dispute was between the parties to this issue. James McWade, by his affidavit originally proffered, not only sought to reduce the levy but insisted that he owed nothing whatever on any account to the plaintiff, but that on the contrary the plaintiff was indebted to him. Under these circumstances the onus was thrown on the plaintiff to prove that some of if not the whole amount he claimed was due, and therefore if he succeeded in establishing any claim binding on the sureties I consider the plaintiff entitled to his costs. The issue was tried in Hilary Term, 1872, and a verdict was rendered for the plaintiff in the sum of £255. 6. 3.

This verdict was set aside on application of the plaintiff on the ground that according to the evidence it was insufficient and a new trial granted, the costs of the first trial to abide the event. It was again tried in last Hilary Term and the verdict was again for the plaintiff, but for a reduced amount, viz. : £220. 18. 11.

In each case, however, the amount of verdict exceeded any amount which the plaintiff claimed irrespective of the agreement to build the ship and the above named John A. McDonald and Henry McWade would, as I consider, be liable to pay this excess at all events, and perhaps the whole of the amount of the verdict.

The plaintiff has, therefore, succeeded in establishing a claim upon the execution and although it is for a reduced amount, yet as defendant never tendered or admitted any amount was due from him, but on the contrary denied any indebtedness, I hold that as the plaintiff is entitled to his general costs on this issue, except those of the first trial, the costs of which were to abide the event, and as the event has been that on the second trial, the plaintiff failed in recovering any larger amount than on the first occasion, but on the contrary obtained a verdict for a less sum, I do not consider him entitled to his costs of the first trial and have therefore taxed off the whole of them. See *Hudson v. Marjoribanks* (1).

(1) 8 Moore 440; S. C. 1 Bing. 393.

DOE DEM SIMON CHIVERIE AND OTHERS V. JOHN KNIGHT.

Ejectment—Delivery—Marksman—Burden of proof of deed having been read is on party impeaching it.

Defendant claimed under a deed from Francis Chiverie, the plaintiffs as his heirs. The grantor was a marksman, and the attestation clause was simply "Witness." It was objected to the deed that there was no evidence of delivery, (2) that the grantor being illiterate the attestation clause should have stated it to have been read or explained to him, and unless this was proved to have been done the deed was void. Defendant stated that the subscribing witness, who is since dead, was his clerk at the date of the deed. Defendant did not remember if he himself was present when the deed was signed, or whether the grantor delivered it to him, but he thought the grantor gave it to the subscribing witness, defendant's clerk, but in one of these two ways it came into his possession. The judge left the question of delivery to the jury, who found for plaintiff. Defendant moved to set aside the verdict as contrary to evidence and for a new trial.

Held, (Peters, J.) That the evidence did not warrant the finding of the jury.

2. That the rule that an illiterate person has a right to have a deed read or explained to him is subject to the qualification that he should require it to be read or explained, and the burden of proof lies on the party impeaching the deed.

MOTION to set aside verdict for plaintiff as contrary to evidence and for a new trial.

10th May, 1873.

Mr. McLeod shews cause; C. Palmer, Q. C. follows.

Mr. Hodgson, *contra*; Palmer, Q. C., follows.

Cur. ad. vult.

7th July, 1873.

PETERS, J. In this action of ejectment the defendant claimed under a deed from Francis Chiverie, the lessors of the plaintiff's father, under whom the lessors claimed as heirs. The deed concluded in the usual manner, "I have hereunto set my hand and seal," and is signed "Francis Chiverie X," (his mark) "witness," not "signed, sealed and delivered."

It was objected first, that there was no evidence of a delivery, and secondly, as the grantor was illiterate and a marksman, the attestation clause should have stated that it was read or explained to him, and therefore unless it was proved to have been read or explained it was void.

Knight, the defendant, stated that the subscribing witness, who is since dead, at the date of the deed was his clerk, that he did not recollect whether he, the defendant, was present when the deed was signed or whether the grantor delivered it to him; but he rather thought he gave it to the witness, his clerk. He also stated that he thought he purchased one acre first, and afterwards agreeing with the grantor for another acre gave back the first deed and took the present deed for the two acres, and it is for this last purchased acre that this action is brought.

I left the question of delivery to the jury, and the question is, did the evidence warrant their finding, and we are of opinion that it did not.

There can be no doubt that the delivery of a deed to a stranger for the grantee, or even executing it with the intention that it shall operate as a deed, is a sufficient delivery. In Sheppard's Touchstone, 57, it is laid down: "And the fifth thing required in every well made deed is that there be a delivery of it, and this it must be known is either actual, *i. e.* by doing something and saying nothing, or else verbal, *i. e.* by saying something and doing nothing. Or it may be both and either of these may make a good delivery and a perfect deed." In *Doe dem Garbons v. Knight* (1), Mr. Justice Bailey says: "Where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show that he did not intend it to operate immediately, it is a valid and effectual deed, and the delivery to the party who is

(1) 8 D. & R. 348.

to take by it, or to any person to his use is not essential." And see also *Xenos v. Wickham* (2).

Now here the attestation, as I shall presently show, proves the sealing and delivery of the deed by the grantor in the presence of the deceased attesting witness. Then we find the deed in the grantee's possession, who cannot recollect whether the grantor gave it to him or left it with his clerk, but in one or other of these ways he swears it came into his possession. Now why did the grantor sign and seal that deed unless he intended it to operate at once. If the attesting witness had not occupied the situation of clerk to the grantee, the presumption that he received it from the grantor for the defendant would not have been so strong. There is nothing to lead us to believe that the clerk resorted to any fraud or artifice in obtaining possession of it, and under all the circumstances it seems beyond the bounds of probability that it was left with him for any other purpose, the only evidence to rebut this presumption is to be found in the evidence given with the double object of showing that the grantor did not deliver the deed, and also on the Statute of Limitations, but none of this evidence touched or related to the time when the deed was signed and sealed and witnessed by the defendant's clerk. That evidence, so far as it related to the deed consisted chiefly of the evidence of Simon Chiverie, the instigator of the suit, that the grantor died in 1850; that the plaintiffs cut hay on it in 1852, and that when he (Simon) went away to sea in the spring of 1854, Knight had not enclosed it, but when he returned in the autumn he said that he then enquired of his brother Francis, who said that Knight had taken too much land, that he told Knight so, and that Knight replied he had a right to two acres, and from this kind of evidence the plaintiffs seek to have it inferred that this deed which is sufficiently proved to have been signed and sealed by old Chiverie came into Knight's possession without a formal

delivery to him or his clerk. In *Hare v. Horton*, (1) it was held that the fact of the deed being in the grantee's possession was *prima facie* evidence of its having been delivered to him as a deed. And in 2 Greenleaf's Evidence s. 297, it is said:—"The possession of the deed by the grantee or obligee is, in the absence of opposing circumstances, *prima facie* evidence of delivery." Even if this evidence stood un rebutted, we should be inclined to think it insufficient to rebut the legal presumption arising from mere possession of the deed. But in opposition to this Charles Chiverie, the brother of Simon, and one of the plaintiffs, says that Knight fenced in the two acres the year the land was sold, that his father told him in his own house that he had sold to Knight, that the witness came to his father's (the grantor's) house, where his father was getting a cod-line to measure the land for Knight, that Knight was there at the time, that he thinks it was measured the same day he got the cod-line, that Knight's fence ran from the garden fence to Levee's line, that he has worked at the fence often since in the same place, that he asked his father if the line would not come very near the house, who replied that "there would be a strip left still." Whereas there would have been the strip and the breadth of an acre besides if Knight was only to have one acre.

Michael Pocket also stated that he asked Francis Chiverie, one of the testator's sons (now dead), when he was ploughing, if the garden fence was not the line between them and Knight, and he said that it was. In addition to this Absolem Gregory testified that he drew a will for old Francis four months before his death, that it was necessary to shew him the line to enable him to draw the will, that the old man came out of the house and pointed out the garden fence as the line between him and Knight. "He said, 'follow the fence to Levee's line'. That Dr. Muttart's fence is now about the same spot. He

(1) 5 B. & Ad. 715.

told me he had dealings with Knight, and he said to the best of my recollection he was getting two acres." This evidence surely should have been deemed sufficient to rebut any inference arising from the plaintiffs' evidence (if indeed any could have been fairly drawn from it) in opposition to the legal presumption of delivery arising from possession of the deed by the defendant. In *Doe dem Spillsbury v. Burdett* (1), it was held, affirming the decision of Sir J. Leache in *Buller v. Burt* (2), that a general attestation such as this affirms all that has been done in the presence of the witness which is stated in the body of the instrument. The proof of the signature of the deceased witness therefore proved that the deed was signed and sealed by the grantor at its date. It is true it does not prove the delivery, but when we have it proved that the grantor at the time mentioned signed and sealed the deed, and couple that with Knight's possession of the deed and his subsequent possession of the land in accordance with it (whether we adopt the statement of the defendant and his witnesses and take that possession to have commenced in 1850, or adopt the statement of Simon Chiverie and his witnesses and take it to have commenced in 1854) it certainly forms a very strong chain of circumstantial evidence in favor of the defendant on this point even if there was no legal presumption of delivery in his favor, which according to the authorities there certainly is.

As to the second ground that it does not appear that the deed was read or explained, the rule no doubt is that where the grantor is blind or illiterate he has a right to have the deed read or explained to him. But the rule is subject to the important qualification that the blind or illiterate person should require to have it read to him. For if he does not and chooses to sign it without its being

(1) 9 A. & E. 939. n. (a).

(2) Cited in *Spillsbury vs. Burdett*, 9 A. & E. 944. n. (c) in full in S.C. 4 A. & E. 15, 16 & 17.

read or explained he will be bound by it although contrary to his meaning. In Sheppard's Touchstone, p. 56, it is laid down: "The third thing in every well made deed is that if the party that is to seal it be a blind or illiterate man and desire to hear it read that it be so read," but "if the party that is to seal the deed can read himself and doth not, or being an illiterate or blind man doth not require to hear the deed read or the contents thereof declared, in these cases albeit the deed be contrary to his mind, yet it is good and unavoidable at law." See *Manser' case* (1), and *Thoroughgood's case* (2).

There is no evidence here that the grantor required to have the deed read or explained to him, and therefore he is at law bound by it whether he understood it or not. It may be said that where the grantor and the witness are both dead the means of proving his demand to have it read are gone. But the burthen of proving this lies on the party impeaching the deed, or in other words asserting that such demand was made. To allow the mere suggestion of such a demand to shift the burthen of proof on the party claiming under it would be not only to render titles under deeds so signed insecure, but constantly to increase that insecurity as the lapse of time rendered proof of the real facts more difficult to be procured.

On both grounds we think our judgment should be for making the rule absolute.

(1) 2 Coke 3.

(2) Noy. 73. S. C. 2 Coke 9.

BRADLEY V. THE QUEEN.

Petition of Right—Fraud by Government official—Order addressed to no one to “pay bearer” amount of salary due from Government not an assignment unless it is shewn to have been intended as such.

Petitioner, a schoolmaster, under the usual trustees' certificate became entitled to receive \$44.50 from the Government. By 33 Vic. cap. 12, the Governor-in-Council, after the Secretary or the Board of Education shall have furnished the Government with a list of teachers entitled to salaries, and the amounts together with all vouchers, shall cause treasury warrants to be issued payable to the Colonial Treasurer. to be by him applied towards paying the teachers, and that the clerk of the council should place the warrant in the treasurer's hands with a certified copy of the list, and that the clerk of the council should draw orders for the several amounts of the salaries on the treasurer, who should pay them when presented at his office. Instead of following the Act the Government or its officials gave McNeill, Secretary of the Board of Education, cheques on the treasurer payable to bearer, thus giving him control over the money whereby he was enabled to defraud both Government and individuals of large sums. In Bradley's case the cheque was given to McNeill on 5th September, although the order for payment was not made until the 9th. The trustees' certificate was dated in August and had an indorsement in McNeill's handwriting dated 5th September, as follows, “Pay John McNeill or order.” and signed by Bradley. When Bradley came for his money McNeill instead of giving him a cheque filled up an order payable to bearer and addressed to no one' and told him to go to Hayden who would give him his money, and if there was any discount he (McNeill) would pay it, and Hayden having charged \$1.50 McNeill repaid it to Bradley. On the same day Bradley at McNeill's request signed his name to the trustees' certificate, but he could not remember if the indorsement “Pay to John McNeill or order” was there when he signed or not. In his evidence Bradley said he considered himself paid by McNeill. The action though in Bradley's name was really by Hayden, who claimed to be his assignee and therefore entitled to use his name. The defence of the Government was that the petitioner had received payment from McNeill, the official appointed to pay him, and that no assignment was made or intended to be made by him to Hayden, and the question was whether under the circumstances there was an assignment or not.

Held, (Peters, J.) That there was no assignment and that an order of the nature given was not an assignment unless shewn that it was intended to be such.

2. That this case was properly cognizable in equity and not in a court of law.

PETITION OF RIGHT.

29th October, 1873.

Mr. Hodgson for petitioner.

Attorney-General and Solicitor-General for the Crown.

Cur. ad. vult.

13th January, 1874.

PETERS, J. This was a petition of right. The facts briefly stated are these: The petitioner is a schoolmaster, and under the usual trustees' certificate, dated the 10th of August, 1873, became entitled to the sum of forty-four dollars and fifty cents. By the Act of 33 Vic. cap. 12 it is enacted "That the Governor in Council shall within a convenient time after the Secretary of the Board of Education shall have furnished the Executive Council with a list of the names of teachers entitled to salaries, and the amounts thereof and other particulars accompanied by all the vouchers and certificates in his hands relating to such salaries, cause to be issued for their payment treasury warrants not exceeding in amount each the sum of £500, bearing no interest and payable to the colonial treasurer for the time being, in order to be by him applied towards payment of teachers' salaries as hereinafter directed; and the clerk of the council shall place the warrant in the hands of the treasurer with a copy of the list certified as correct by the president of the council," and by section two it is enacted that "the clerk of the council shall draw orders for the several amounts of salaries respectively due to each teacher on the said treasurer who shall pay such orders when presented at his office."

Instead of following the directions of the Act the Government or its officials appear to have placed unbounded

confidence in McNeill, giving him cheques on the treasurer payable to bearer which should have been delivered to the schoolmasters or their order, thus in reality allowing him to have control of the school money whereby, as the result proved, he was enabled to defraud both Government and individuals out of very considerable sums of money. In this case it appears that the cheque for the petitioner's money was given by the clerk of the council to McNeill or Wadman (he cannot say which) on the 5th of September, although according to Mr. DesBrisay's evidence the order for payment was not made by the president of the council until the 9th. The certificate from the trustees of the school of the amount due Bradley is dated August, and on the back is an indorsement dated the 5th September in McNeill's hand-writing as follows: "Pay John McNeill or order," signed by the petitioner, this it appears from the petitioner's evidence is ante-dated, no doubt with the object of making it correspond with the date of the cheque in his favor which McNeill had misappropriated. The petitioner who was called as a witness states as follows: "When I first went to McNeill for my money he said the money was not ready, but to wait a minute and he would see if he could get it, he went out and I remained, he came back and told me to go to Hayden and he would pay me the money,"—McNeill at the same time filled up the blue order dated the 23rd September, hereinafter set out, for the petitioner to take to Hayden,—"he told me if Hayden charged any discount to come back and he would pay the difference, I went to Hayden and he paid me deducting \$1.50, I returned to McNeill and he paid me the \$1.50, and I considered myself paid." He further stated that on the same day either before or after Hayden paid the money—he could not say which—he at McNeill's request signed his name on the back of the trustees' certificate, McNeill said it was necessary to do so that Hayden might get the money, but he does not know whether the indorsement "pay to John McNeill or bearer"

was on the certificate when he signed it. The action thus brought in petitioner's name is really an action by Hayden who claims to be assignee of the petitioner, and therefore entitled to use his name for recovery of the money paid to him from the Government.

The defence set up by the Government is that the plaintiff received payment of his salary from McNeill, the officer appointed to pay him, and that no assignment was made or intended to be made by him to Hayden. The question therefore is, was there an assignment or not? and I think there was not.

McNeill was the officer to pay him, and on the 23rd September the petitioner goes to his office for payment, McNeill tells him the money was not ready (but it was only in consequence of his having previously misappropriated it by giving the petitioner's cheque to Wadman that it was not ready) still he tells him to wait a minute and he will see if he can get it, he goes out and comes back and tells him to go to Hayden and he would pay him, McNeill at the same time fills up the following order :—

“Charlottetown,
23rd Sept. 1872.

“Pay bearer my salary for three months' services as teacher at Lot 29, amounting to \$44.50, at office of Secretary of Board of Education.”

Which petitioner by McNeill's directions delivered to Hayden; this order it is to be observed is payable to no one in particular and is addressed to no one. I think it very doubtful whether such a document of itself would operate as an assignment as no assignee is named, but on this point I express no opinion. If it had been addressed to anyone it would probably have been good as a bill of exchange, and in case of non-payment Hayden might have recovered the money back from the petitioner. But this point is not important to the question I am considering, for an assignment of a chose in action may be

made by parole without writing, *Best v. Argles* (1), *Tibbett v. George* (2), and therefore coupled with private evidence it might have that effect. But no order will operate as an assignment unless the parties intended it should have that effect, and taking the evidence of the petitioner in connection with the order it seems to me plain that the petitioner considered himself as receiving payment from McNeill. The order is simply to pay to bearer; it is filled up by McNeill immediately after his return from what the petitioner must have considered his successful attempt to get the money for him, and by McNeill's direction he takes it to Hayden and receives the money. The presumption from this I think is that the petitioner must have considered the order as in the nature of a cheque on or a voucher for Hayden and not as an assignment, a presumption strengthened by the fact that the delivery of the order to Hayden and receipt of the money from him did not close the transaction, but that he had to return to the public office and get the balance from McNeill, and on receipt of that and not till then was his claim fully satisfied; and secondly, by another fact that either before he went to Hayden or just after he returned to McNeill and received the balance, he signed his name on the back of the teachers' certificate to what in its language is an assignment to McNeill, or if the indorsement was not then written on it would be a voucher for McNeill to the Government that he had paid it; and in whichever light we view it, it was really part of the *res gestæ* and shows that neither he nor McNeill considered that he had already, by what was called the blue order of the 23rd of September above set out, assigned it to Hayden, else why should he have assigned it again? Under all these circumstances I think the fair conclusion is that the petitioner considered himself as receiving payment from McNeill, and that all he did was merely intended as an acknowledgement of it.

(1) 2 C. & M 394.

(2) 5 A. & E. 107.

But on a broader ground, even if Hayden were clearly assignee I think we should not allow him under the circumstances to maintain this action in the assignee's name. It appears from the evidence that McNeill held the office of secretary to the Board of Education; that the Government improperly allowed large sums of school money to pass through his hands, and the result was that he became a defaulter to a very large amount. Hayden and Wadman (though not jointly) were in the habit of advancing money to pay the teachers' stipends when McNeill either truly or falsely represented himself without funds to pay them; according to Wadman's evidence the transactions generally took place by McNeill bringing the orders to him and getting the money, but sometimes, he says, the teachers brought them. If the cheque had not been issued when the cash was advanced the person advancing it would be entitled to the money at the next council day when the order for payment would be made and the cheque issued. And it appears that in the usual course of business such council days are held twice in each month. Now assuming that the party cashing an order would on an average have to wait a week for the passing of the order which would enable McNeill to recoup him, and that the discount was at the rate charged in this instance, viz., \$1.50 on \$44.50, he would receive interest at the rate of 177 per cent. per annum. Now although so heavy a discount might not be much if paid in a few isolated cases by men who did not wish to come back from a distance in the country for so small a sum, yet when applied to a course of dealings amounting to thousands it certainly appears enormous and, if McNeill really paid it in other cases as he did in this, his being a large defaulter is not astonishing. Now there is much in the evidence to lead to the supposition that many of the orders were cashed and the money really advanced for the benefit of McNeill. Wadman's statement that he used to make out a list of the orders he had cashed before each

council day, and that McNeill used to come in and revise it by striking out names and substituting the names of teachers whose orders he never had cashed, by which means he got the petitioner's cheque on the 5th of September, looks as if McNeill exercised complete control over his accounts and moulded them to suit his own purposes. Again Hayden produced the following undertaking from McNeill :—

“\$513.48.

“Due Mr. Alexander Hayden or bearer, five hundred and thirteen dollars and forty-eight cents, payable on demand out of warrants of the 1st C. of November, 1872, per his vouchers.

“J. McNEILL.”

On the back of this is indorsed in McNeill's handwriting as follows :—

Due.
\$300.

Due.
\$313.48.

Payable in full 24th December, 1872.

Hayden states that these amounts of \$300 and \$313.48 include the amount for which this suit is brought. Now if this \$613 was not advanced or allowed to stand over for the benefit of McNeill why was it allowed to stand over till the 24th December, when he must have known that the funds for liquidating it must long before have been placed at McNeill's disposal by the Government? Again, when McNeill failed Hayden treated him as his debtor by issuing a process against him. All these circumstances raise a very strong (I do not say conclusive) presumption that he made the advances or gave time to repay to accommodate McNeill, and looked personally to him. But even if the credit were not expressly given to McNeill, yet if on an examination of all the circumstances attending the dealings between McNeill and Hayden respecting the discounting or advancing money on these certificates it should appear that those circumstances were such as should have warned Hayden that the advances he was

making, whether in the shape of discounts to teachers or to McNeill, were really being used to enable McNeill to conceal his misconduct, then the principle contained in the maxim *ex turpi causa non oritur actio* would apply to him and prevent his recovering the money either from McNeill or the Government. This principle is clearly laid down by Chief Justice Wilmot in the leading case of *Collins v. Blanter* (1), decided in the reign of George III. He says, "this is a contract to tempt a man to transgress the law, to do that which is injurious to the community; it is void by the Common Law, and the reason why the Common Law says such contracts are void is for the public good, you shall not stipulate for iniquity. All writers upon our law agree in this, that no polluted hand shall touch the pure fountains of justice; whosoever is party to an unlawful contract, if he have once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again; you shall not have a right of action when you come into a Court of Justice in this unclean manner to recover it back." The principle of this decision has been acted on in numerous cases ever since, which are thus briefly summed up by Mr. Addison (884), "All contracts, bonds, indemnities, guarantees and undertakings tending to induce sheriffs, gaolers, town clerks and public officers to violate or neglect their duty, or made to protect them from the consequences of their own misconduct are absolutely null and void."

The principle is so flexible and searching that it applies to every transaction where the real object of the advance is to assist in the commission of or prevent the detection of what is criminal or illegal and contrary to the public good, "no matter (to use the language of Chief Justice Wilmot) how the transactions may be gilded over to conceal the truth, whenever courts of law see such attempts made to conceal such deeds they will brush away the

(3) 2 Wilson 341. S. C. 1 Sm. L. C. 154.

cobweb varnish and show the transactions in their true light." I do not mean to say that the circumstances were sufficient notice to Hayden of McNeill's delinquency, because as the evidence stands no one can say whether they were or not. But I think no one can look at Wadman's account of his dealings with McNeill without coming to the conclusion that he must at least have more than suspected it, and it is not improbable that the character of McNeill's dealings were pretty much the same with both. But an inquiry into the length of time during which these kind of dealings have been carried on between Hayden and McNeill, a statement of the particular items comprised in the due bill payable the 24th December, the rate of interest charged and directly or indirectly paid by McNeill to Hayden, the total amounts discounted, and whether each teacher's order so discounted was presented to McNeill and paid out of money appropriated by the Government for the payment of orders of that date, or allowed to stand over and be liquidated out of moneys which he must have known were appropriated by the Government for the liquidation of subsequently accruing salaries, and on which therefore the orders so allowed to stand over could not lawfully attach, would go far to solve the question.

In *Carvalho v. Burn* (1), where a similar question, viz., whether certain documents were an assignment, the Court in giving judgment says: It is not necessary to decide whether the agreement gave an irrevocable though contingent interest in the goods, and whether the assignees in the events which have since happened are or are not trustees for the defendants, and bound to repay out of the proceeds of the goods in question the amount which they have paid. The defendants may have an equitable right to be paid out of the goods or their proceeds, but the question whether they have such a right and the mode of enforcing it belongs to a Court of Equity. In *Best*

(1) 4 B. & Ad. 383.

v. Thorowgood (1), the same question arose on the following documents :—

“We hereby authorize the executors of the late Captain Argles to pay to you any legacy or moneys which he may have bequeathed to us or either of us, in part payment of the various sums you have so kindly lent us; and your receipt shall be to them a sufficient discharge for the same. There appears to be about £150 due you.

“J. H. THOROWGOOD,

“CATHERINE THOROWGOOD.

“5 King St., 10th July, 1831.

“To Mr. Argles.”

The document was enclosed in the following letter, which was given in evidence :—

“DEAR GEORGE,—Myself and Kate herewith send you an order to receive any legacy and moneys there may be left to us by our dear departed uncle, in part payment to you for the sum due, although I fear it will not cover your demand against us; but you must take the will for the deed.

“J. H. THOROWGOOD.”

Bailey, J., in delivering the judgment of the Court says, “the question is whether or not the authority to receive the legacy, either alone or coupled with the letter, was an assignment either at law or in equity; we agree that if this was plainly and clearly an assignment either at law or in equity, then Thorowgood, the insolvent, would only have been trustee for the defendant, and consequently no interest would pass to his assignees on his discharge under the Insolvent Act, and his creditors could have no claim to this legacy, we are therefore to see whether this is such a trust or not; if it is a doubtful equity it must be left to a Court of Equity,” and after some other observations he continues, “we do not say that it will not give a right in equity to this legacy; but it is not so clear that we can say that a Court of Equity would certainly decree that the legacy passed to the defendant. In looking into the cases at law and in equity I cannot see

(1) 4 Tyr. 256.

anything which satisfied me that this was an assignment." And he concludes by saying, "sitting in a Court of law we would be going beyond what the law can go to say that this is an equitable assignment. We shall proceed on the authority of *Carvalho v. Burn* (1) and say as the equity is not clear that the defendant must go to a Court of Equity."

I think the same course should be pursued here; besides it is very obvious that the Hayden claim, not only to this \$44.50, but to a large aggregate amount composed of similar small sums, as well as the Government's defence, rests on the real nature of his dealings with McNeill, and that this can only be properly ascertained in a Court having power to direct the taking of accounts and the enquiries and issues necessary for that purpose. Under these circumstances it would be most unreasonable and unjust to permit him to fight behind each teacher whose order he has obtained, and thus extract his demand piecemeal from the Government by a multiplicity of suits, in which in all probability the real defence of the Government could not be set up. In a Court of Equity he and the Government will meet face to face; if it appears that the laxity of the Government has enabled its officer to obtain money from him, not really as a loan to the officer, but to liquidate public liabilities, and that there was no complicity on his part, or knowledge that his advances served to screen the officer's misconduct, equity will give him relief, but that laxity will not entitle him to succeed if his own conduct has not been free from blame.

There is another reason for sending him to equity; Hayden denied that he told Robins that McNeill had paid him \$200 on account. But Robins swore positively that Hayden told him that McNeill paid him \$200 on account, and that he owed him \$400, which he had promised to pay him after the next council day. Now if a Court of Equity, on the accounts being taken, should be of opinion

(1) 4 B. & Ad. 383.

that only \$200 of the due bill was ever due, as the \$44.50, the subject of this suit, is included in the due bill; it is plain that if allowed to recover in this action he would get the \$44.50 twice paid.

I have taken some pains to give my reasons for this decision fully, because the principle involved respecting the rights of parties dealing with public officers is important; and also because where a suitor is turned out of Court I think it right to vindicate the maxim that "there is no wrong without a remedy," by letting him understand why it is done, as well as by pointing out where, if his own conduct has been *sans reproche*, he may obtain full relief. The judgment must be for the Government.

Another case by Hayden against the Government in the name of another master in a similar transaction was tried just before this, in which the petitioner had judgment, but the evidence in that case differed in some important particulars from that adduced in this; besides the whole facts attending the transaction were not so fully developed as in this, or the judgment in that case would have been for the Government also.

DOE DEM JOHN GREEN AND OTHERS V. JAMES HIGGINS.

Rule nisi for new trial need not set out grounds—Estoppel—Death of landlord terminates tenancy at will—Ground not taken at trial—Costs.

Joseph Green laid off part of his farm in building lots and streets, all delineated on a plan. In 1854 he gave defendant a lease of a lot which purported to be bounded on the east by one of the new streets, called Cedar Street, and in 1856 gave him a deed of the same land. Defendant had encroached some twenty feet on Cedar Street, though not taking more than the area of his lot, and the action was to recover possession of the part of Cedar Street. On the trial defendant gave evidence to show that Joseph Green had gone to the place with him and pointed out the land, and that he had built on the land so pointed out. It also appeared that Joseph Green, after giving the lease, having found out that defendant had built on Cedar Street, went and told him so, and that on another occasion he offered defendant £10 to move back, adding that if defendant did not do so he (Green) must, and finally when defendant had neglected to move he told him that he (defendant) must move at his own expense. Joseph Green afterwards died, having devised his lands to the lessors of the plaintiff. Defendant contended that he was a tenant at will, and entitled to demand of possession before ejectment, which had not been given. For the plaintiffs it was contended that Joseph Green's acts and declarations were in themselves a determination of the tenancy. At the trial the judge told the jury that if they found Joseph Green had gone down and pointed out the land, as contended by defendant, that his subsequent acts and declarations were not sufficient to terminate the tenancy at will, and their verdict ought to be for defendant, and the jury so found. Plaintiff moved to set aside the verdict and for a new trial on the ground of misdirection, and also on the ground, not taken at the trial, that the tenancy at will was determined by Joseph Green's death.

Held, (Hensley, J.) That the direction to the jury was right.

2. That Joseph Green's death was a termination of the tenancy, and a new trial must be granted on that ground, but not having been taken at the trial, plaintiff must pay the costs of the first trial, and each party must pay their own costs of the present rule, etc.

MOTION to set aside verdict for defendant in ejectment and for a new trial.

31st October, 1873.

Mr. Shaw shews cause.

Charles Palmer, Q. C., *contra*.

Cur. ad. vult.

3rd February, 1874.

HENSLEY, J. This cause was tried at St. Eleanor's in June Term, 1873, and a rule nisi for a new trial was granted in Trinity Term, Queen's County, for misdirection, etc., and in Michaelmas Term, 1873, cause was shewn by counsel for defendant against making the rule absolute on the grounds:—

1st. That the rule nisi does not set out grounds of application, that this objection is fatal, and cites solely in support a verbal decision of this Court in 1870, in a cause of *Ross v. Dunphy* on same point.

Having considered that case, and the authorities relating to practice upon this point, I am of opinion that the decision referred to was hastily given and not correct, being based as I think on an erroneous view of the effect of note (7) to page 1341 of 2 Archbold's Practice of Q. B. and other Courts. That note refers to page 612 of Chitty's Forms of the same edition for a form of rule nisi for a new trial "setting out the grounds." On referring to the page three different forms of rules nisi are set out. Those in Q. B. and C. P. are general and set out no grounds whatever, but in the form relating to the Exchequer, and in that alone, the grounds appear in detail. In the appendix to Tidd's Practice Forms (1840), page 331, and former editions, the same distinction prevails. The rule nisi in Exchequer contains in detail the various grounds of application, but in Q. B. and C. P. they are again general and silent on the specific points on which the rule was moved for and granted. On looking over Tidd, Archbold, Lush, Impey and Chitty's General Practice I can find nothing at any time formerly or latterly denoting that so far as the practice of the Court of Q. B. is concerned (which governs our own) any other course was

required to be followed than the general form of rules nisi for new trials to which I have referred, and from what I have ascertained on the subject I am satisfied that the practice of this Court previous to the case of *Ross v. Dunphy* was the same, and that it was not before held necessary that rules nisi for a new trial should detail the points of application.

A rule of Court made with the view of ordaining future practice would of course be binding and conclusive; not so one decision on a point of practice if afterwards found to be erroneous, which I think that in the case of *Ross v. Dunphy* was. I am therefore of opinion that the objection taken by the counsel for the defendant with respect to the form of the rule in this case should not be allowed.

It is true that in the former case of *Ross v. Dunphy* an application was afterwards made to the Court to reconsider its decision on this point, but not entertained on the ground that a final decision delivered by the Court in any case will not be allowed to be re-opened so far as that particular case is concerned.

Having disposed of this point of practice the way is opened out for the consideration of the real meritorious and substantial grounds of this application,—that is the misdirection of the Judge (being myself) in telling the jury that a demand of possession made by the plaintiff on the defendant was, under the circumstances necessary, before a verdict could be given in favor of the former.

The circumstances were these as they appeared in evidence:—Mr. Joseph Green (deceased) was in 1856 owner of a farm on which part of Summerside is now built. In 1854, or thereabouts, a survey was made by Mr. Anderson at the instance of Mr. Green, and a plan made laying off the farm, or a portion of it, in building lots fronting on streets, also, as Mr. Anderson stated, staked off and delineated on the plan which was produced at the trial. On the 27th June, 1854, Mr. Green gave the defendant, James Higgins, a lease of a portion of the

lands as laid off, which purported to be bounded on the east one hundred feet by Cedar Street (one of the streets denoted on Mr. Anderson's plan), and on 27th November, 1856, Mr. Green gave Higgins a deed in fee simple of the same portion. It was alleged on behalf of the plaintiff that under the lease and deed Higgins had occupied some twenty feet or more to the east than he should have done, and had consequently encroached twenty feet on Cedar Street, but had not in reality taken possession of any greater area of land than his deed purported to give him, but the first question was where was the line of Cedar Street, and had the defendant encroached twenty feet or thereabouts upon it, because the action was brought to recover possession of what was alleged to be Cedar Street. Mr. Anderson and others were examined on this point, and made out that defendant had advanced a considerable distance into Cedar Street, and I told the jury in charging them that the evidence seemed very clear that the defendant's house was built on part of Cedar Street, and that irrespective of any possession given by Joseph Green to him, to which I shall hereafter refer, the plaintiff's right to recover was complete. It was, however, alleged on the part of the defendant that after obtaining the lease from Mr. Green, and before he obtained the deed, and before he built his house, that he consulted with Mr. Green where he should build it, and that thereupon Mr. Green went down to the land and shewed defendant two stakes and said, "There is the front of your lot," and that defendant thereupon built his house about eighteen inches back even from the line pointed out by Mr. Green, on the spot which is now claimed as Cedar Street, although Mr. Green had pointed it out as being within the defendant's building lot. On the other hand it was alleged, and some evidence given on part of the plaintiff to shew that Mr. Green never went down to the land and pointed it out by stakes, etc., in the way in which defendant alleged that he did, but merely (at a distance from it) pointed it out

in such general terms as "your land lies over there," pointing towards it with his hand. Sometime after giving the lease it appears Mr. Green found out that Higgins had built on Cedar Street and he went to him and told him so, and also told him "he was on the wrong land." Again on another occasion Mr. Green offered defendant £10 to move back, telling him that "if he (defendant) did not move back he (Green) would have to do so," meaning, as I understood, that if defendant did not move back he (Green) would have to alter the lines of his own land, and the plan generally, to meet defendant's encroachment, and finally that Mr. Green told defendant, after he had neglected or refused to shift his house, that "he (defendant) would have to move it at his own expense." Mr. Green afterwards died, and devised his land to the lessors of the plaintiff, who brought this action to recover so much of the land occupied by defendant as was upon Cedar Street, which it must be borne in mind was a street proposed to be dedicated as such by a private individual to the public, and had been laid off and denoted on a plan made for that contemplated purpose. Under these circumstances it was contended on part of the defendant that he was a tenant at will and was entitled to a demand of possession before ejectment brought, which was met on the part of the plaintiff by submitting that the formal demand of possession, which otherwise would have been required, was rendered unnecessary by the acts and declarations of Mr. Green, already detailed, which it was argued were so inconsistent with the tenancy at will as in law to amount to a determination of it. Although it was thus contended generally that no demand of possession was necessary it was solely urged upon the grounds to which I have alluded, of Mr. Green's acts and words, and the point in support of it now taken, that the death of old Mr. Green was of itself a termination of the will, was not expressly referred to or urged at the trial, and not being brought to my notice did not occur to me at the

trial, and I presume not to the counsel either, as it was not mentioned until moving for the rule nisi to set aside the verdict. I brought, therefore, to the notice of the jury the allegation that Mr. Green went down and pointed out the land by stakes, metes and bounds, but that this was contradicted, and I directed them that if they did not think Mr. Green did this their verdict should be for the plaintiff, but if they should be of opinion that Mr. Green did do so that I did not consider his acts and words were sufficiently strong by themselves to terminate the tenancy, and no proof being given of a demand of possession their verdict in this view of the case should be for the defendant. The jury found for the defendant, evidently adopting the view that Mr. Green did point out the land by metes and bounds, and that plaintiffs therefore, under my charge, were not entitled to recover.

The grounds taken to set aside the verdict for misdirection, although at first specially relating to the direction to the jury that a demand of possession might under certain circumstances be necessary, have since been amplified so as to embrace the point as to whether the tenancy even if at will was not terminated by Mr. Green's death. Having looked over the cases bearing on determination of tenancies at will by acts inconsistent with it on the part of the landlord, and particularly the case of *Price v. Price* (1), where it was held that a threat "to take legal steps to recover possession" did amount to such a determination, I am still of opinion that the mere words and acts of old Mr. Green, to which I have alluded, were not of themselves sufficient for the purpose.

On the first occasion he merely informed the defendant that "he was on the wrong land." On the second the offer of £10 to defendant if he would move back, and that if he did not he (Mr. Green) would have to "alter his own lines," meaning, as I understood, to move his (Mr. Green's) own lines back, denoted no determination, I think, on the part of Mr. Green to compel defendant to

(1) 9 Bing. 356

give up possession, and although that was supplemented by Mr. Green's statement to defendant "that he would have to move at his own expense," I do not consider it sufficiently strong to evidence Mr. Green's intention to terminate the tenancy so as to dispense with a formal demand of possession if otherwise necessary. Acts and words for such a purpose must be clear and unequivocal.

On the latter point, that the death of Mr. Green terminated the tenancy at will and obviated all necessity of a formal demand of possession I have no doubt at all, and had it been expressly referred to at the trial I should have charged the jury to that effect, but the question arises whether parties or their counsel are entitled to raise grounds to impeach a verdict which were not brought to the notice of the Court and insisted on at the trial. In many cases this would evidently be unfair to the Court, the jury, and more particularly to the opposite party, and certainly in the event of a new trial being granted in respect of them would call upon the Court to well weigh the question of costs. If the present application had raised an entirely new ground, both of law and facts unrevealed at the trial, I do not think it should be allowed at all, but there is a distinction raised in cases where an application like the present is made to the Court on a mere consequence of law resulting from a fact proved at the hearing, and an application on a fact not so proved. This distinction appears to have been recognized in the case of *Ritchie v. Bowsfield* (1), and in *Gill v. Dunlop* (2). In the latter case on the trial counsel for plaintiff made reference only to the Statute of 45 Geo. 3, and on the motion for a new trial urged also Statute 42 Geo. 3. Chief Justice Gibbs stated in delivering judgment that on the first trial reference was made to 45 Geo. 3 only, and that he continued to think (as he did at the trial) that the Act 45, Geo. 3, standing alone would not remove the objection taken to the plaintiff's case. It was held that

(1) 7 Taunt 309.

(2) 7 Taunt 195.

the former Statute 42, Geo. 3, was sufficient to remove the objection, and consequently the rule was made absolute in favor of the plaintiff.

So in *Sutton v. Mitchell* (1), defendant at the trial had rested his defence upon the first part of the first section of 7 Geo. 2, cap. 15, but his motion for a new trial was founded on the latter part of the same section also, and Lord Mansfield stated as his judgment that the Act was certainly large enough to take in the matter; that he decided it before on the first part of the section, the latter part not being relied on or mentioned at the trial, and the rule was made absolute, but upon payment of costs by defendant, because it was made on a new ground not opened before at the trial.

Taking the same ground and view in the present case, I think this rule should be made absolute, but upon payment by the lessors of the plaintiff of the costs of the first trial,—and each party to pay his or their own costs of this present rule and application and argument.

(1) 1 T. R. 18.

ALEXANDER MCKINNON v. HENRY PROUD.

Writ dated on Sunday—Practice.

A writ of summons dated on Sunday is void, and a judgment and subsequent proceedings founded thereon will be set aside, and the date of the summons is not amendable.

APPLICATION to set aside a judgment and execution on the ground that the date of the original summons was on Sunday.

27th March, 1874.

HENSLEY, J. This is an application to set aside and declare void a judgment entered by default, and an execution issued thereon and levied by the sheriff, on the grounds that the date of the original summons (15th Feb. last) was on a Sunday; secondly, as regards the execution, that the time between its teste and return-day was too short, being eight (8) days only, instead of thirty days as required by a rule of this Court recently made.

It was contended for the plaintiff that the date of the summons was amendable, and an affidavit was put in to show that although dated on Sunday it was in fact issued on Saturday. I can only look at the face of the writ, however, in determining this matter, and its validity must depend upon that.

It is quite clear from many authorities that a writ tested upon Sunday is absolutely void and a nullity, and it is equally clear that no amendment of what is held to be a nullity can be made or is ever allowed.

The whole of the proceedings, therefore, in this case must be set aside, with costs to the defendant in the matter of this application, to be taxed.

In the case of *Hanson v. Shackleton* (1), cited on the argument, costs were not allowed, but for what reason the report does not state. It probably was on the ground that some unreasonable delay had taken place in making

(1) 4 Dowl. 48.

the application, or that the case was a novel one. But even if such might have been the ground of that decision, and even if any unreasonable delay had taken place in making the present application in respect of defect in the summons, I should be precluded from giving it effect, because the plaintiff subsequently in his execution committed another fatal irregularity, and costs would necessarily follow on that branch of the case, also upon this application to set it aside.

An application was made at the hearing by the plaintiff's attorney for leave to amend the summons and execution. But as all the proceedings depend upon the summons, which for reasons already stated is held to be a nullity, this latter application must be refused.

LOBANG PERRY v. P. E. I. STEAM NAVIGATION CO.

Shipping—Contract with owners—Master's powers.

The master of a ship has no express or implied authority to alter or vary a contract made directly with the owners of his vessel.

APPLICATION on behalf of defendants to set aside a verdict and for a new trial.

5th February, 1874.

Mr. Hodgson shews cause.

Charles Palmer, Q. C., *contra*.

Cur. ad. vult.

5th May, 1874.

HENSLEY, J. This was an action of special assumpsit brought by the plaintiff against the P. E. I. Steam Navigation Company for alleged breach of a contract to tow a wharf from Sheep River, Prince County, to Cape Traverse. It has been twice tried; first, in June Term last at St. Eleanor's, when the jury, being unable to agree, were discharged without giving a verdict, and second, in last October Term at the same place, when the jury found a verdict for the plaintiff for \$2,433.33.

Application was made on the part of the defendants to set aside the verdict and grant a new trial or enter a non-suit, on the following grounds:—

1st. For being contrary to evidence.

2nd. That the master had no right to vary the original contract made at the company's office.

3rd. For variance between the declaration and contract proved (this by way of non-suit).

4th. For excess of damages awarded, this latter leading to a reduction of the verdict.

This was argued at last Hilary Term and now stands for judgment.

The circumstances of the case were simply these, as proved in evidence at the trial:—Some time previously to the month of July, 1871, the plaintiff contracted with the

Government to build a wharf at Cape Traverse. He put it together at Sheep River, near Egmont Bay. It was five hundred and eighty-five feet long, eight feet six inches high, with a ballast floor to it four hundred feet in length. Width about twenty-five feet below and twenty feet at the top. He wished to have it towed bodily by a steamship from Sheep River down the Gulf to Cape Traverse, and accordingly went on the 12th July to the office of the P. E. I. Steam Navigation Company in Charlottetown in company with Mr. Pope to endeavor to contract with them to do the towing business for him. Although Mr. Pope took him to the office he states that he was not present when the contract was made. At the office he met Mr. Duncan, a director, and Mr. Hales, the secretary of the company. After a good deal of preliminary conversation as to the difficulty of the proposed tow on account of the great size and weight of the wharf, a contract was made. According to the plaintiff's evidence, he was told that he must get a hawser and then take the wharf into deep water. They sent him to look for a hawser, but he could not get one in Charlottetown and said he would not be stuck for it but would get one at Summerside or Port Hill. He stated that only one hawser was talked of; that Mr. Hales said it must be seven inch, but did not mention the length. Nothing at all was said about chains to be used in the towing at the steamboat office. This was plaintiff's evidence, and the only evidence on his side as to the original terms of the contract.

Mr. Duncan, witness for defence, after giving preliminary evidence as to the conversation generally, stated that the agreement made was that Perry was to provide two warps, each at least sixty fathoms long, or one sufficiently long to make two, one on each quarter of the boat; that Perry clearly understood he was to have two warps, and was told several places where he could go for them; that he told him to call at Summerside and tell the

captain when all was ready. The weather was to be favorable, and the captain to judge whether he could go or not. He was to go and see Captain Cameron and tell him when he had got the warps.

Mr. Hales also deposed to the terms of the contract that the plaintiff was told he must get suitable warps for towing, either one long one of one hundred and twenty fathoms, or two making a similar length; he further stated that Mr. Duncan gave plaintiff particularly his reasons why the warps were required, and drew a diagram; told him the steamer could not steer except by easing off the warps and hauling in. Cameron was told in plaintiff's presence by Hales, after repeating to him the terms of the contract, that he (Cameron) was to be the judge of the weather, and not to run any risks. That Perry fully understood about the warps, and a condition was made that he was to supply them.

Captain Cameron's evidence, as regards the original contract, was that he saw Perry and Hales at the time in Charlottetown, that chains were never spoken of there at all, that he told them that two warps would be required, of sixty or seventy fathoms each.

Perry failed to procure the warps, and obtained instead four pieces of chain; 1st, one sixty fathoms long of three-quarter inch, short links; 2nd, one fifteen fathoms long of three-quarter inch, short links; 3rd and 4th, two pieces together twenty-five fathoms, of one-half to five-eighth inch links. One hundred fathoms unitedly.

Some time elapsed and Perry having procured the chains and got his wharf into a position to move, and the steamer not coming as he states he expected, he went to Summerside and telegraphed to Mr. Hales to know why she was not coming, and received from him this answer:

28th July, 1871.

Weather not fine enough; see Captain Cameron this evening at Summerside.

F. W. HALES.

Then he went and saw Cameron on two occasions at Summerside, when according to plaintiff's evidence he told Captain Cameron that he had not the warps, but had chains as just described, that the captain thereupon agreed to go and tow him with the chains; that Perry then got his wharf into deep sea water outside, but Captain Cameron failed to come, and after a time a storm coming on the wharf was destroyed by the sea and became a total loss.

This acceptance of the chains was denied by Cameron, whose testimony on the point was corroborated by Finlayson, while Perry's was to some extent supported by that of Charles B. Saunders, Stanislaus Richard, and Lemang Richard.

Thus on the point of the captain's undertaking to vary the contract, by substituting chains for warps, the evidence was conflicting and pretty well balanced, and if on that point of fact alone objection was taken to the verdict I do not think it should be disturbed, being in the state of evidence a matter very proper to be left to the final decision of the jury.

But then the main and really vital points of the case are involved in the grounds taken by the defendants' counsel in objecting to the verdict: that the contract made in Charlottetown with the company was the only one binding upon them; that Perry did not comply with his part of it by procuring the necessary required warps, and notifying them or the captain that he had done so; that the alteration from warps to chains was no immaterial but a substantial one; that the company's contract was made solely on condition that the warps were found, and that if Cameron did agree to vary the contract by accepting chains for warps he had no power as master to do so, and the company were not bound by it even if he did so, and that the verdict of the jury was against the evidence on these points. There were but few cases cited at the argument, and they were the same as those to which I

referred in charging the jury at the trial of the cause, and are collected principally in pages 381-3 of the first volume of Parson's Maritime Law.

Now at the trial, in charging the jury, I stated to them, amongst other things, that it was matter for consideration whether the contract with the directors in Charlottetown was complete and absolute, or whether any part of it was left open to the discretion of the master except the weather, and whether the telegram gave him any additional authority, and I told them that if the warp was absolutely required and insisted upon when the contract was made as a *sine qua non* and no discretion was left to the master in that respect, and that it really was a material part of the contract, I considered that the master had no power to change the warp for a chain, *i. e.*, if he did so, which he denied, and I told them that I thought they would have to set aside a very heavy weight of testimony in arriving at the conclusion that the warps were not required absolutely to be found, or that *aliunde* the chains were equally as good and safe, or that there was no vital or essential difference between chains and warps as means or instruments to be used in towing on the occasion in question.

I thought at the trial, and still think, that the verdict of the jury was not only against the weight of evidence but against almost the whole of the evidence on both sides on these points.

That the warps were spoken of and agreed upon and required to be found before the steamboat company could be required to send their boat down to Sheep River, appears to me conclusively from all the evidence.

Perry himself acknowledged that he was told to get a warp, and after failing to get it in Charlottetown, said he would not be stuck but would get it in Summerside or Port Hill. If the warp was not material to be found, why should Perry be afraid that he would be as he terms it "stuck" if he did not procure it. Duncan affirms that he was to provide two warps at least sixty fathoms long, or

one sufficiently long to make two, and that he was to call at Summerside and tell the captain when he was ready. Hales corroborates this so far as the warps are concerned, and that it was a condition of the contract, and also that Cameron was to be the judge of the weather, and Cameron also states that he also told Perry at the time that two warps of sixty or seventy fathoms each would be required.

An express contract with such a condition attached to it having been made by the parties, I am of opinion that a strict compliance with its terms on the part of the plaintiff must be proved before he can be entitled to recover. Trifling or immaterial variances might perhaps in some cases, by the acts of the other party, be condoned. But was the difference between the warps and chains trifling and immaterial? The length of the warps required was at least one hundred and twenty fathoms. The length of the chains provided was altogether only one hundred fathoms. Perry professed to have no experience at any time in towing matters, and produced no evidence to show that the chain was suitable. Pope, one of his witnesses, stated that two good warps, or one very heavy one, with springs on each side would be required, and that Perry spoke to him about warps but he had none to give him. Duncan stated that he was positive it could not be done with a chain and gave reasons for this opinion, and further, that if Perry had said anything about a chain he never would have consented to the contract. Cameron stated that warps were used to tow rafts, and that he would not go with a chain however heavy, he could not handle it and did not think the wharf could be towed with them if tried. Lund stated that two warps were necessary with sixty to seventy fathoms in each; he did not think it could be done with fifteen, sixty, and twenty-five fathoms of chain. There was fear of chains breaking and injuring the vessel; that the largest of the chains provided, viz., three-quarter inch, would not do to tow the wharf by. Nothing less than one inch would suffice. Finlayson

stated that in his opinion one hundred fathoms of chain would not be sufficient for the work, and that seventy fathoms of hawser on each line would be little enough, and finally Captain Evans gave similar evidence that two large warps of sixty fathoms each would be required, and gave reasons why in his opinion the chains were insufficient and unsuitable.

But then it is urged on the part of the plaintiff that the captain was authorized to vary the contract and to accept the chains as a means of towing in place of the warps

1st. By the telegram from Hales of the 28th July 1871.

2nd. By his general authority as master of the ship to bind his owners by such contracts.

The first point of the authority given by Hales' telegram cannot in my opinion be sustained, because it related to the weather only, which it was at first and all along agreed was to be left to Cameron's judgment. The words speak for themselves :—

“Weather not fine enough ; see Captain Cameron this evening at Summerside.”

As regards the second point, of the authority of the master to bind his owners, in such a case the law is very clearly laid down in the work to which I have already referred, 1 Parson's Maritime Law, 381, thus :—“The powers of the master are not quite so indefinite as his duties. They rest upon certain ascertained principles, and are for the most part measured by exact rules. He is the agent of the owner, appointed by him, and by that appointment authorized to act as his agent in all matters which are fairly embraced within the scope of his appointment.” Again he lays it down as follows :—“When the owner is himself present, or within easy access, that agency of the master, which is founded on necessity, disappears for the necessity has ceased to exist,” and as an instance this case is put : A master may sell a ship when the sale is justified by a sufficient necessity, but no necessity can be sufficient if the owner were so near that

the master was not obliged to act without his instructions. At page 383 he says, "One general limitation of the power of the master to bind the owner by the contracts he makes for him is this, they must relate to the condition or the use and employment of the ship, and be within the usual duty and business of a master, and they must not be so unreasonable in themselves as to raise the idea that the contracting party acted recklessly in making them."

The same law and reason which makes the agency of the master cease in making a contract where the owner is present, or within easy access, would equally apply to the case of making a material alteration in one already made. Indeed the law is very clear and strong as regards the want of power of the master to annul or vary a contract already made in any material point, and is well exemplified in the case of *Burgon v. Sharp* (1), which was an action for freight and demurrage on a memorandum for a charter from London to Buenos Ayres and back. When the ship arrived in the River Platte it was found that Buenos Ayres had been captured by the Spaniards, and she went to Montevideo. There her outward cargo was unloaded and accepted by one of the defendants who was on the spot, and desired that she might wait a certain number of days for a return cargo, which finally could not be procured for her. The plaintiff contended that Montevideo had under these circumstances been substituted for Buenos Ayres, and that defendants were liable in the same manner as if the agreement had on his part been performed as it stood in the written memorandum. The judge asked who represented Burgon in this substitution, and plaintiff's counsel contended that the captain had sufficient authority for the purpose. But Lord Ellenborough said the captain was captain for the voyage originally agreed upon on which the vessel sailed from England. Everything out of that voyage was beyond the

(1) 2 Camp. 529.

scope of his authority as captain. As such he had no power to change that voyage for another. The person who is entrusted with the command of a ship may be vested with a complete control as to her employment and destination, but this is superinduced upon his authority as captain, and to shew that the captain in this case could do away with the contract entered into by the owner and conclude a fresh contract binding on both parties, you must go further than merely shewing that he was captain of the ship. That the doctrine laid down by Lord Ellenborough in this case is the accepted and ruling one on this point is deducible from the way in which it is, so far as I can ascertain, referred to in all the leading works on the subject of Shipping. In 1 Parson's 388, it is thus stated:—"A master cannot by any official or implied authority annul or materially vary a contract expressly made by the owner himself. Circumstances may change entirely, and it is perhaps possible that this change may be such as to authorize the master to rescind or vary the owner's express contract, still in point of fact it may be said that nothing can raise a presumption of authority to do this, nor can he bind the owner by a contract which is clearly neither necessary nor beneficial."

In Maude & Pollock on Shipping, edition of 1864, p. 114, the law is thus laid down:—"Although the immediate control of a ship as to her employment is vested in the master, he has no power to alter the voyage or to vary the rate of freight in contravention of the agreement made between his owner and the freighter."

Again, in McLachlan on Shipping, 1862, page 127, is the following reference to this doctrine:—"If the owners themselves have made a special contract for the employment of their ship, the master cannot, by his general and implied authority as master only, annul such contract and substitute another for it with the other contracting party."

And Abbott on Shipping, 7th edition, p. 130, states his view of the law in terms identical with those already

referred to as used by McLachlan in his work on the same subject.

In the 9th edition of Lees on Shipping and Insurance (1865) the law is thus stated:—"If the owners by themselves or a ship's husband have made a special contract for the employment of the ship, the captain cannot, under his general and implied authority, annul the contract so made and substitute another for it made by himself with the other contracting parties."

Being of opinion, on very careful consideration of the facts of this case and the law on the subject to which I have felt myself called upon to refer at such length, that by the terms of the contract the plaintiff was bound to procure the warps specified before the company could be called upon to tow the wharf; that the warps being positively required by the company to be found, were thereby made material, and that if this was not the case, still that on the evidence the varying the contract by accepting chains of the character described for the warp was a material variation, and being of opinion that the master had no power to make such a variation, if he did so I think that the verdict in this case ought to be set aside on the two first grounds named:—

1st. For being against the evidence.

2nd. Because the master had no right to vary the contract.

As regards the point of variance between the declaration and contract proved, which would be a ground for a non-suit, I have doubt about it, and think under all the circumstances of the case, and without now deciding upon it, that the plaintiff before proceeding to his new trial should have leave to amend his declaration by addition of new counts or otherwise if he thinks fit to do so.

The conclusion to which I have arrived renders it unnecessary for me to advert to the 4th point, which simply related to reduction of the damages awarded on the ground of excess.

PETERS, J. This was an action brought against the Steam Navigation Company to recover damages for not towing a wharf which the company had agreed to tow.

The facts briefly stated appear to be these: the plaintiff contracted with the Government of P. E. Island to build a wharf at Cape Traverse, and in pursuance of that contract he proceeded to construct the wharf at Sheep River, in Egmont Bay, intending to tow it to the site on which it was to be placed at Cape Traverse. The structure being completed the plaintiff applied to the steamboat company to tow it. From the evidence it appears that a good deal of discussion took place between the plaintiff and the directors; but the result was that the company agreed to make the attempt with the steamer "Princess of Wales" on the first fine Tuesday, Thursday or Saturday after the making the contract. It appears that much pains was taken by Mr. Duucan, one of the directors, in explaining to the plaintiff the description and length of warps he would require. He was told he would require one hawser of one hundred and twenty fathoms, or two of sixty fathoms each; the plaintiff was to pay the company £50 if the work was accomplished, and in case of failure £1 per hour from the time of the steamer's leaving, and on this understanding being come to it was agreed that plaintiff should move his wharf out to a position where the steamer could get hold of it, and give the company notice when he was ready. The plaintiff endeavored to get the hawsers, but not being able to do so he procured chains, one eighty fathoms, one fifteen fathoms, and two twenty-five fathoms; the plaintiff moved his wharf outside the harbor, but the steamer not coming when he expected her he telegraphed the company asking why the steamer had not been sent, and received from Mr. Hales, the secretary of the company, the following answer:—

"Weather not fine enough, see Captain Cameron."

The plaintiff saw Captain Cameron; Cameron asked him if he had the warps, he told him he had got the chains of

the length mentioned, and a good deal of discussion appears to have taken place between them about the chains, which according to the testimony of the plaintiff, in a collateral way corroborated by some of his witnesses, resulted in Captain Cameron agreeing to make the attempt on Saturday with the chains, but Captain Cameron in his testimony denied this, and some witnesses gave evidence which in a collateral way rebutted the evidence of the plaintiff's witnesses on this point. The plaintiff had the wharf ready on Saturday but the steamer did not come; on the following Monday the plaintiff went to Cameron again and asked him why he had disappointed him, and Cameron then promised to come the next day if the weather was fine, which it was, and the plaintiff returned to the wharf confident that the steamer would come the next day and make the attempt. But Captain Cameron again disappointed him and did not come. It appeared that in order to have the wharf ready for the steamer he removed it from the safe position where it had previously been to an exposed position outside, and that on Wednesday following a storm came on which broke it up and caused its total loss. The question whether Captain Cameron agreed to tow with chains was one entirely for the jury to decide on the conflicting evidence before them, and I think it would be going a very unusual length to set aside the verdict on this ground, and more particularly as the conduct of the plaintiff in going back and removing his raft to the exposed position where he did place it, shows that however Captain Cameron understood it the plaintiff must have understood he had agreed to make the attempt with the gear he had provided, and that he really expected the steamer to come, otherwise he would not have placed his wharf or allowed it to remain in that position. But it is contended that the agreement was that the plaintiff should provide hawsers of the length and kind described by Mr. Duncan, and that his doing so was a "condition precedent" to his right to call upon the com-

pany to make the attempt to tow, and that the captain had no authority to agree to substitute chains for hawsers, and undoubtedly if the intention of the parties in making the agreement really was that nothing but hawsers of the kind described should be used, then until the plaintiff had provided them he had no right to call upon the company to perform its contract; and no agreement of the captain to substitute chains could make it liable, because it is quite clear that although a master may make contracts for the hire of a ship he cannot vary a contract which the owners have made. But though the master of a ship cannot vary an express contract of the owner, he is the general agent of the owner to perform all things relating to the general employment of the ship, and therefore in carrying out any special service which the owners have agreed the ship shall perform, his agency must be so far general that it must cover not merely the precise thing to be done, but whatsoever usually and rationally belongs to the doing of it."—1 Par. Con. 44. The question therefore is did the parties intend that the precise description of towing tackle pointed out by Mr. Duncan and no other should be used? The construction of every written contract, unless where terms of a particular trade are used, is for the Court, but where it is parole it is for the jury to consider the evidence and decide what the contract intended really was. But whether made by writing or parole, in endeavoring to ascertain what the parties intended, not only the words used by the parties, but also the situation of the parties at the time, and of the property which is the subject matter of the contract, and the situation and purpose of the parties in making the contract must be taken into consideration, because it often is necessary "to reason from the aim and object of an instrument or contract to ascertain the meaning of the terms used, or to determine its application to cases unforeseen and unprovided for."—2 Par. Con. 491. The

judgment of Martin, B., in *Bradford v. Williams* (1), affords an instance of using the nature of the contract to throw light on the terms used by the parties, he says, "the rule with regard to what are conditions precedent is well stated in *Pordage v. Cole* (2), contracts are so various in their terms that it is really impossible to argue from the letter of one to the letter of another. All we can do is to apply the spirit of the law to the facts of each particular case. Now I think the words "condition precedent" unfortunate. The real question apart from all technical expressions is what in each instance is the substance of the contract, and it seems to me here, under the circumstances alleged and having reference to the nature of the charter party, the plaintiff was entitled to declare the contract at an end," and Parson's Con. 526, says, "mutual contracts sometimes contain a condition the breach of which by one party permits the other to throw the contract up and consider it as altogether null; whether a provision shall have this effect, for which purpose it must be construed as an absolute condition, is sometimes a question of extreme difficulty. It is quite certain, however, that no precise words are now requisite to constitute a condition, and perhaps that no formal words will constitute a condition if it be obvious from the whole instrument that it was not the intention or understanding of the parties." From the report of the learned judge who tried the cause this question seems to have been very properly left to the jury. And if they had been of opinion that the substantial agreement was that if the plaintiff did not provide hawsers the company would not undertake to make the attempt with anything else, the verdict must have been for the defendant. Did the evidence warrant them in finding as in effect they have done that the parties did not intend to make the precise description of towing tackle a condition precedent? and it seems to me that

(1) L. R. 7 Ex. 259.

(2) 1 Notes to Wms. Saund. 548.

under the circumstances, and having regard to the nature of the service contracted to be performed, and to the provisions for remuneration which evidently contemplated the possibility of a failure, and provided for remunerating the company notwithstanding, that they were justified in so finding.

The evidence was that the company agreed to tow—the plaintiff finding tackle; that Mr. Duncan told him he would require two hawsers of certain lengths and size, and that he took great pains to explain to him how they were to be used, and the plaintiff left intending to procure them. Now it seems to me that any person unacquainted with towing applying to a tug owner would have very much the same kind of information given him, and if he was foolish enough to disregard the advice, and in consequence of the inferiority of the chain the vessel or thing to be towed was injured or lost, he would have himself only to blame for the misfortune. But I can scarcely believe that any mercantile man would suppose that under such an agreement, after placing his property in a dangerous position in expectation of the tug coming to take hold of it, and losing it because it did not come, the tug owners would be absolved from liability because a hawser was not so strong, or a few feet shorter than the one it was understood he should procure, if in fact he had procured towing tackle fairly sufficient to make the attempt, and when the weakness or shortness of the hawser would not cause increased danger to the tug, yet if as contended for, the exact description of towing tackle mentioned in making such a contract must be provided, this would be its effect. Again, the master of a tug is bound to use due skill and care in towing; yet if in the case put the master of the tug commenced towing with weaker or shorter hawsers than it was intended to use, and from gross carelessness, and not through deficiency of the warps, caused the loss of the property towed, the owners would not be liable because the master in under-

taking to tow with tackle not precisely such as was agreed upon would not in regard to the contract be acting as the owner's agent. It does not seem to me that the parties would not usually consider that such results could flow from contracts of this description.

Now the evidence as to the possibility of towing with chains, as I understand it, amounts to this, not that the work could not be done with chains, but that in the opinion of the witnesses hawsers were more likely to procure a successful performance of it, and on Captain Cameron telling the plaintiff so he replies that he is willing to take all the risk, and that if they broke or would not answer he could cast it off. I cannot see how danger to the steamer or loss of hire to the company could result from using the chains, as if anything went wrong the steamer could cast off the wharf and go on without it, and yet earn the stipulated hire for the time the vessel was engaged in making the attempt. If then the substantial agreement between the parties did not bind the plaintiff to provide the precise description of tackle described by Mr. Duncan, will the agreement with the master to make the attempt with the tackle the plaintiff had provided bind the company? To answer this question recourse must be had to the general principles of the Law of Agency. It is a well established principle of that law that where a particular agent exceeds his authority the principal is not bound, but if a general agent exceed his authority the principal is bound, provided the agent acted within the ordinary and usual scope of the business he was authorized to transact and the party dealing with the agent did not know that he exceeded his authority.—*Grant v. Norway* (1), 1 Par. Con. 42. "Thus constant usage," says Mr. Smith, M. L. 59, "shows that masters of vessels have that general authority, and if a more limited one is given, a party not informed of it is not affected by such limitation, the master is the general agent to perform all

(1) 10 C. B. 664.

things relating to the usual employment of the ship, and the authority of such an agent to perform all things usual in the line of business in which he is employed cannot be limited to any private dealing with him." "Is it then usual in the management of a vessel contracting to tow, for the master to decide on the sufficiency of the tackle which the owner of the thing to be towed has provided? I think it is difficult to conceive a man acting more apparently within the scope of his authority than a master deciding such a question under such circumstances. But this case does not rest solely on that general principle. The plaintiff telegraphed the company to inquire why the steamer had not come, the answer is, "weather not fine enough, see Captain Cameron." It was argued that this related only to the weather; it no doubt made the previous bad weather an excuse for not having come, but whatever Mr. Hales may have meant by the words, "see Captain Cameron," I think the plaintiff might justly suppose, and I think any common man under the circumstances would naturally understand from them that he was referred to Captain Cameron for any information he required as to arrangements respecting the towing. In Parsons on Contracts 44, after pointing out the distinction between general and special agency it is said "of late years the Courts seem more disposed to regard this distinction and the rules founded upon it as altogether subordinate to that principle which may be called the foundation of the Law of Agency, namely, that a principal is responsible either when he has given an agent sufficient authority or when he justifies a party dealing with his agent in believing that he has given to his agent this authority." Now when I find the plaintiff after receiving this telegram going to Captain Cameron and arranging for the towing with chains, as after the finding of the jury we are bound to believe he did, and then performing, as he was bound to do, the first act in carrying out the contract by removing the wharf to a position where the steamer could

get hold of it, and which caused its loss, the case does seem to me to come within the principle laid down by Mr. Parsons, of a principal justifying a party dealing with his agent in believing that he has given his agent authority, and in my judgment it is difficult to see why the company should be absolved from liability, unless the exact description of tackle mentioned formed a condition precedent, which the jury have, as I think, correctly found it did not.

I have purposely abstained from adverting to the evidence of Mr. Duncan and others, to the effect that they would not have agreed to tow with the chains if they had been mentioned, because I think that what is really said on the occasion of the making of a contract, and the nature of the thing to be done, and other circumstances relating to it, are the only matters which can properly be taken into consideration by those who have to decide what the agreement really was, if something which may or may not appertain to the contract is not expressly excluded, whether it was intended to exclude it or not must so far as words are concerned be ascertained from what was said at the time of making the contract, and not from what a party seeking to absolve himself from liability may afterwards declare he would have done had the matter been mentioned. Opinions as to how one would have acted under such circumstances, are apt to be very flexible and elastic, at all events as the other contracting party had no notice of them he should not be prejudiced by them. *Howard v. Sheward* (1), which is a strong illustration of the power of an agent to bind his principal—even against his express direction—in all matters within the scope of the business he is employed to transact, also shews that nothing which one contracting party may say or think or do if unknown to the other will affect him. There Thomas Sheward, a horse dealer, sold his brother's (the defendant's) horse to the plaintiff, his brother expressly

(1) L. R. 2. C. P. 148.

telling him not to warrant it sound, but Thomas Sheward did warrant it sound, it proved unsound, and the plaintiff sued the defendant and recovered, because it was within the scope of a horse dealer's business to warrant, and no notice was given to the plaintiff that the horse dealer was told not to do so.

I have stated my reasons for the opinion I entertain in this case, and which I am therefore bound to express, but my brother, Mr. Justice Hensley, who tried the case, entertains a different opinion; when the Court are equally divided the rule is that the party moving takes nothing by his motion, and the plaintiff would therefore be entitled to enter judgment on his verdict, but considering that the judge who tried the cause had an opportunity of forming a more correct opinion as to the weight of the evidence than one who did not, I will yield my opinion to his so far as making the rule for a new trial absolute is concerned; but I think the plaintiff should have leave, if he wishes, to amend his declaration, on payment of costs (occasioned by amendment) by adding a count in a contract to tow, the defendant finding necessary tackle, and another on a substituted contract, as I think it very doubtful whether he would not be non-suited on a mere matter of form on his present declaration, every count being on an alternative contract; this is an amendment which under the C. L. P. Act he would have been allowed to make at the trial, and I think the costs should abide the event.

NOTES :

In *Ritchie v. Atkinson* (1), where the question was whether under a contract to load a complete cargo *pro rata* freight could be recovered, the defence was that loading a full cargo was a condition precedent. LeBranch, J., says it is clear that the delivery of a complete cargo does not go to the whole consideration of the

(1) 10 East. 295.

freight, because the failure of bringing home one ton less than the full quantity of four hundred tons would prevent the plaintiff from recovering for the three hundred and ninety-nine.

Gain v. Roberts (1), vide Broom's Legal Maxims 829, Principles of Agency.

(1) W. N. 23 May 1874, p. 117.

DOE DEM GREEN v. HIGGINS.

Ejectment—Estoppel by acts.

Green had laid off land in building lots and streets, but there was nothing to show where the streets were situated, and they had not been dedicated to the public. He sold a lot described as fronting on Cedar Street to defendant, who wishing to build asked Green to show him his lot, and Green pointed out a plot of land and told him he could build there. Defendant built on the land so pointed out, but it turned out that Green had made a mistake and that the land was really part of Cedar Street. Plaintiffs wished defendant to move his house back, and on his refusal brought this action to eject him. At the trial the judge told the jury that Green's acts estopped him, and there was a verdict for defendant. A rule was then moved for to set aside the verdict for mis-direction.

Held, (Peters, J.) That the direction was right, and the plaintiffs were estopped.

MOTION for rule to set aside verdict for defendant on the ground of mis-direction.

17th July, 1874.

Mr. McLeod for plaintiff.

Mr. Shaw for defendant.

18th July, 1874.

PETERS, J. In this case Green had laid off a plot of land, part of his farm, into building lots, and sold a lot to the defendant, described in the deed as bounded by Cedar Street according to a survey made by Alexander Anderson, surveyor. The whole plot of land was vacant, and no visible marks were to be seen denoting where Cedar Street was. The defendant being about to build on the lot he had purchased requested Green to point out to him where the boundary of Cedar Street was; Green came and pointed it out and told defendant he could build there, and the defendant on the faith of that representation, taking that to be the boundary of the street did so. Green had done nothing to dedicate the street to the public, and owning all the land might have altered the site of the street (so far as the public were concerned) if he chose,

and he alone had the means of knowing where he had located the street. The defendant having built his house, Green discovered that he had made a mistake, and that the spot he had told the plaintiff he might build on was in the intended street, and wished plaintiff to move his house back, and on his refusal to do so brings this action to eject him. I told the jury that Green's acts estopped him. A rule is moved for to set aside the verdict for mis-direction.

The rule laid down in *Pickard v. Sears* (1), is "that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." In *Freeman v. Cook* (2), this rule is affirmed but qualified. Parke, B., says "by the term 'wilfully,' however, in that rule we must understand it not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted on accordingly, and if whatever a man's real intention may be he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant, he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission where there is a duty upon a person to disclose the truth may often have the same effect." And in *Cairncross v. Lorrimer* (3), Lord Campbell, Chancellor, says, "the doctrine of estoppels is found I believe in the laws of all civilized nations, that if a man either by words or conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully

(1) 6 Ad. & El. 469.

(3) 3 MacQ. H. L. C 829.

(2) 2 Exch. 654.

done without his consent, and he thereby induces others to do that from which they might otherwise have abstained, he cannot question the legality of the act he so sanctioned to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct." But it was contended that a party making an admission under a mistake is not bound by the estoppel. In the rule as laid down by Baron Park in *Freeman v. Cooke* (1), no such qualification is implied, and in *Heane v. Rogers* (2), the very question arose and is thus disposed of in the judgment of the Court delivered by Bailey, J.: "There is no doubt but that the express admission of a party to a suit, or admission implied from his conduct, are evidence and strong evidence against him, but we think he is at liberty to prove such admissions were mistaken or were untrue, and is not estopped or concluded by them unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him) and that transaction." And this case was acquiesced in and acted on in *Newton v. Liddiard* (3). Lord Denman there says, "the general doctrine laid down in *Heane v. Rogers* (4), that a party is at liberty to prove that his admissions were mistaken or untrue, and is not estopped or concluded by them unless another person has been induced by them to alter his condition, is applicable to mistakes in respect of legal liability as well as in respect of fact." No one can doubt that Green intended the defendant to act on what he told him, and if that were doubtful Green, who alone had the means of knowledge, was guilty of gross negligence in pointing out to him the site of Cedar Street without being sure that what he said was correct. The rule of law on this precise point is laid down by Baron Wilde in *Swan v.*

(1) 2 Exch. 654

(2) 9 B. & C. 577.

(3) 13 Jur. 253. S. C. 12 Q. B. 925.

(4) 9 B. & C. 577.

The North British Australasian Company (1), “the rule
“which I deduce from the authorities is this, that if a
“man has led others into a belief of a certain state of
“facts by conduct or culpable neglect calculated to have
“that result, and they have acted on that belief, to their
“prejudice he shall not be heard afterwards as against
“such persons to show that state of facts did not exist.”
In short and in plain language, a man is not permitted to
charge the consequences of his own fault on others, and
complain of that which he has himself brought about.
There is no ground for a rule in this case.

(1) 2 H. & C. 175.

JAMES MCINTYRE v. JOHN MCINTYRE.*Parceners--Tenancy from year to year.*

Children of a deceased tenant from year to year are co-parceners or tenants in common, and the widow of the deceased tenant has no power to dispossess them.

MOTION to set aside verdict for plaintiff in an action of trespass.

6th May, 1874.

Charles Palmer, Q. C., Mr. McLeod, Mr. Bayfield and Mr. Shaw for plaintiff.

Mr. Alley and Mr. Davies, *contra*.

Cur. ad. vult.

17th July, 1874.

PETERS, J. In this case Norman McIntyre, the plaintiff's father, died intestate in 1848, possessed of the house and farm on which he resided as tenant from year to year, leaving a widow, the plaintiff and defendant and several other children. The widow and several of the daughters have continued to reside in the house ever since, and so did the plaintiff with some interruptions, and since 1860 he has continued to reside with his mother on the farm, and has by his labor reclaimed a portion of it from a wilderness state, but in 1872 he went away to avoid arrest, leaving his wife in the house with his mother. The mother one day when the wife was out had all her things put out of the house, and refused her admission. She attempted to force her way back, and the defendant by her orders resisted the wife, and in doing so assaulted her for which assault this action is brought; and the real question is whether the plaintiff was not a parcener or tenant in common with the other children, and I think it clear that he was.

It was argued that the widow must after the death of her husband be considered as continuing tenant from year

to year. *Rees v. Perrot* (1) was cited, but that case only decided that as against the landlord the possession of the widow fixed her as assignee of the tenancy, and that the service of the notice to quit on her was sufficient to determine the tenancy in the absence of proof that any will was made or administration granted. Here there was not only no executor or administrator, but there were no debts, and the landlord although he had headed the account of that farm as "Widow McIntyre," says that it was only a designation of the farm, and that he did not intend to determine the tenancy and create a new one, but considered it kept alive for whoever the law determined it belonged to, and under the statute of distributions it would belong to all the children after deducting the widow's interest as tenants in common.

There can be no doubt that a tenancy from year to year is a springing interest continually renewed for a new year before the current year determines; thus in *Oxley v. James* (2), it was held that a tenant from year to year, who demises by indenture for a term however long, has by reason of the possibility of his interest continuing longer than the demised term, a reversion with which the benefit of the covenant in the deed may pass to the assignee during the continuance of the tenancy from year to year. And in *Kelly v. Patterson* (3), Coleridge, C. J., in giving judgment says, "that it seems from the cases that a tenancy from year to year may continue to exist after the death of one of the parties unless the heir or legal representative shall do something to manifest his intention to determine the tenancy." Here as nothing was ever done to destroy the tenancy from year to year it still exists, and the plaintiff was a tenant in common, and his wife was justified in regaining the possession of which the widow had so improperly deprived her. In a

(1) 4 C. & P. 230.

(2) 13 M. & W. 209.

(3) L. R. 9. C. P. 682.

country where so many persons depend on similar holdings were the contention of the defendant's counsel adopted it would be in the power of the widow to deprive her children of all their interest in paternal property of this description.

The rule for a new trial must be discharged.

END OF VOL. I.



DIGEST.

Abandonment — See MARINE INSURANCE. 2.

Absent Debtor Act, 20 Geo. III., c. 9—*Attachment—Agent not summoned may defend first trial without waiving principal's right to rehearing—Waiver—New trial.*] The Absent Debtor Act, 20 Geo. III., c. 9, gave the absent debtor the right to a rehearing within three years after judgment. Under the Act an attachment was issued against W. but no summons was served on his agent:—*Held*, that the agent had a right to defend without waiving his principal's right to a rehearing. CORMACK v. WORREL. 1

2.—*Trustee process—Insufficient notice of assignment—Chose in action not assignable at law.*] Defendant was sued under the trustee process by C. & C. as a debtor to McD. (an absent debtor), the present plaintiff. On 11th Sept., 1849, C. & C. issued their attachment against McD., and on 11th Dec., 1849, served the summons on defendant, who, on the 12th, made a deposition admitting indebtedness to McD., which was put in at Hilary Term, 1850. In July, 1848, McD. assigned all his effects and credits to J. McD. as trustee for certain creditors mentioned in the assignment, which was by deed poll executed by McD. only, neither the trustee nor any of the creditors being privy to it. On 11th Dec., 1849, this action was commenced by the trustee in McD.'s name against defendant, who was also sued under the trustee process by C. & C. C. & C. had recovered

judgment in the Absent Debtor suit against McD., and defendant had paid the amount due McD. to the sheriff on an execution issued by C. & C. under their judgment against McD. Defendant had no notice of the assignment when he made his deposition. The first notice of it was given in Court when defendant's deposition was put in and read. *Held*, that sufficient notice of the assignment had not been given, (2) that the assignment was not binding as against C. & C., (3) that the subject matter in dispute, being a chose in action, could not be assigned at law. McDONALD v. LONGWORTH 49

3.—*Garnishee, service of summons on—Irregularity.*] The Absent Debtor Act, 20 Geo. III., c. 9, enacted that a summons under that Act "being duly served, and return being made thereof under the hand of the Sheriff or his deputy, shall be sufficient in law to bring forward a trial without any other or further summons." A summons had been served on McNutt, as garnishee of defendant, by an attorney's clerk, and there was no return under the Sheriff's hand. A similar summons was afterwards served on McNutt at the suit of Black, who moved to set the former summons aside on the ground that it was not legally served. *Held*, that a mere irregularity in the service might be waived by defendant, but the absence of the sheriff's return was a fatal defect which could not be cured by any act or consent of the opposite

party. (3) that the attaching creditor's judgment giving him a lien on funds in the garnishee's hands placed him in the defendant's shoes quoad these funds, and being therefore, a privy in interest he had a right to point out defects in proceedings affecting them. **BLACK v. SHAW** . . . 194

4.—*Suit begun by attachment must be brought to trial at third term Discontinuance.* An attachment and all subsequent proceedings are dissolved if the plaintiff neglect to bring the cause to trial at the third term without having obtained leave to continue it to another. A motion to set aside such proceedings may be made by a subsequent attachor who tried and obtained judgment at the third term. **WOOD v. GAY** . . . 200

5.—*Both parties resident abroad—Attachment lies against defendant temporarily within jurisdiction, but concealing himself.* Plaintiff and defendant were both residents of Nova Scotia, and the debt was contracted there. Defendant having come to P. E. Island temporarily, plaintiff caused a Bailable Writ to be issued against him while here, which was returned *non est inventus*. Plaintiff then issued an absent debtor's attachment and summoned Yates as garnishee. A motion was made to quash this attachment on the ground that both parties being non-residents and the debt contracted abroad, they did not come within the provisions of the Act. *Held*, that the non-resident plaintiff could proceed, and that the non-resident defendant was liable. **MCKEAN & SUTHERLAND v. MCKENZIE** 203

6.—A person in possession of choses in action is not chargeable as garnishee. **HEARD v. PHILLIPS** . . . 219

Absence from country not necessarily discontinuance of possession. *See* **STATUTE OF LIMITATIONS**.

Affidavit—Criminal information. *See* **CRIMINAL INFORMATION**.

—Made in England—Authentication. *See* **BANKRUPTCY**. 1.

Affidavit—Setting aside Special Jury panel. *See* **SPECIAL JURY**.

Affinity of one of several J. P.'s trying cause, to party ground for setting aside judgment.—J. P.'s affinity to principal, ground for setting aside judgment against servant.] On appeal. In several cases of assault arising out of the same matter, from convictions by four J. P.'s, it appeared that one of the J. P.'s was married to a first cousin of the principal respondent, and the other respondents at the time of the alleged assaults, though not of affinity to any of the J. P.'s, were servants of the principal respondent. *Held*, that the convictions must be set aside, and that no distinction could be made between the case of the principal respondent and the cases of his servants, but that all must be set aside. **CAMPBELL v. MCINTOSH** . . . 433

—*See* **NEW TRIAL**.

Amendment after demurrer argued. *See* **PLEADING**.

Appeal from School Rate. *See* **BOARD OF EDUCATION**.

Application to redeem lands. *See* **LAND TAX ACT**.

—Quashing Special Jury panel. *See* **SPECIAL JURY**.

Attachment for not executing deed as ordered by the Court—*Defendants evading tender of deed—Deed ordered to be deposited with their Attorney for execution.* Defendants evaded service of an order of the Court for the execution of a deed, and also evaded tender of the deed therein mentioned, and the Court ordered the deed to be deposited with their attorney for execution. They did not execute it, and a rule nisi for an attachment was granted. *Held*, that the rule must be made absolute, but that no attachment issue for 32 days and then only against such defendants as should not, by that time, have executed the deed. **SULLIVAN v. CARR & RAMSAYS**. . . 312

—*See* **ABSENT DEBTOR ACT** 1.43

Award—*Uncertainty—Demurrer.* Plaintiff's declaration set out an award alone, and to this defendant

objected on the ground of its uncertainty, as it directed an annuity to be paid plaintiff out of her claims on the property, without showing what these claims were or on what property they attached. *Held*, that the award was certain, (2) that an objection to an award on demurrer must appear on its face, or by facts stated in the plea. *McINTYRE v. MCINTYRE* . 307

Bailiff, opening door. *See* DISTRESS.

Bankruptcy—23rd sec. of English Statute, 5 & 6 Vic. c. 122, granting freedom from arrest until final Examination does not extend to colonies—Certificate of Bankruptcy would extend Affidavit made in England must be authenticated here.) A debtor arrested in P. E. I. applied to be discharged under the English Bankruptcy Act, 5 & 6 Vic., cap. 122, sec. 23, on the ground that he had been declared a bankrupt in England, and the Commissioner of Bankruptcy there had, by endorsement on the summons pursuant to the Statute, granted him time to finish his examination, and that he was not liable to arrest in a Colony until that time had expired. The summons and endorsement purported to be signed by E. G., Commissioner of Bankruptcy, and was authenticated by the certificate of S., who described himself as a notary of the city of London, and the fact of his being a notary was certified under the seal of the Lord Mayor. *Held*, that an English Certificate of Bankruptcy would extend to the Colonies, but that the interim protection afforded by section 23 of the English Act would not extend, (2) that the summons, etc., were not properly authenticated, not having been verified by an affidavit made before an officer of this Court. — *v. IRVING* 28

2.—*Proof of foreign law.* Foreign Bankruptcy is a bar to an action on a debt contracted abroad, and the foreign law may be proved by the oral evidence of professional men. *WEATHERS v. GREEN* 97

—English certificate of, *See* BANKRUPTCY. 1.

Board of Education—15 Vic. c. 15—Order locating schoolhouse within three miles of another—School rate—Appeal.] Where a

School Act enacted that a school-house could not be legally located within three miles of one already established, but the Board of Education established one within the limit, the decision of the Board (until reversed on certiorari) is conclusive, and in collateral proceedings no evidence can be heard to contradict it. The Act also provided that when a settlement desired the erection of a new school district, five of the inhabitants should make a request therefor in writing to the Board, which was then to "proceed as pointed out by the Act." The requisition was dated in January, but the Act did not come into force until April. *Held*, on appeal from a conviction for a school rate, that the requisition was to the former Board and was not such as the Act required, and that all proceedings founded on it were void. *ROBINSON v. McQUAID* 103

Bond—Limit. *See* ESCAPE. 2.
—Performance of contract. *See* CONTRACT. 1.

Boundaries—Old. *See* CHARLOTTETOWN INCORPORATION ACT. 1.

Branch of Contract—*See* CONTRACT. 1.

Carrier—Trove—Liability for loss of article in custody of passenger.] Ramsay was employed to drive Bell and others to a reception meeting, but had not been hired by them. He drove them to the meeting, left them there, and, his engagement being at an end, went away. Bell had a plaid with him in the carriage and left it there. It was not marked, and next day Ramsay, not knowing to whom it belonged, took it to the person who had employed him, to be delivered to the owner, but it never was delivered and was lost. Bell subsequently applied to Ramsay for it, but was received with abusive language. Bell brought an action of trover in the Small Debt Court and recovered judgment. *Held*, on appeal, that Ramsay was not chargeable as a common carrier, and even if he was, the plaid being an article of personal wear and not given into his custody, did not come within the description of articles for which he would have been responsible. (2) That if he was a carrier quoad the plaid, the remedy, no conversation being shown,

was case not trover, (3) that at most he was a bailee by finding, and as such was not guilty of any culpable negligence. *RANNEY v. BELL*. 417

Certificate—English Bankruptcy Act, 5 & 6, Vic. c. 122. See BANKRUPTCY. 1.

Certiorari—Public wharf—Construction of Statute abridging public right—Lieut. Governor in Council has not power under 18 Vic. Cap. 34, Sec. 12, to impose rates on boats or head-money on passengers using wharf. "Vessel" does not comprehend "boat." The 18 Vic. Cap. 34, sec. 12, gave the Lieut. Governor in Council control of Minchen's Point wharf, with power to establish rates of wharfege for vessels, and to make such rules and regulations as he might think fit. An order under this section provided that any boat or vessel used by any one but the licensed ferryman in ferrying passengers, or landing or taking off the same from the wharf, should pay 1s. for each such passenger, and 2s. 6d. for each time such boat or vessel touched at or landed passengers on the wharf, to be paid by the persons owning or working such boat or vessel. A boat of defendant's, used in ferrying without hire, touched several times at the wharf, and passengers embarked in the boat from the wharf. Judgment was recovered by plaintiff in the Mayor's Court, and was now removed by certiorari into the Supreme Court. Defendant contended (1) that under the Act the Governor in Council had power to impose rates on vessels only, that a boat was not a vessel, and the order was therefore void as to boats, (2) that the Act gave no power to impose a charge of head-money in respect of persons embarking from the wharf in such a boat. *Held*, that the Act is one abridging a public right and must be strictly construed, and it did not give power to impose such rates, and that the judgment in the Mayor's Court must be quashed. *BOUNCE v. MURPHY*. 120

Charges disallowed—Equity of redemption. See LAND TAX ACT. 1.

Charlottetown Incorporation Act—Encroachments on

streets—Power of City Council to open new streets—Old boundaries.] The *Charlottetown Incorporation Act*, 18 Vic. Cap. 34, Sec. 50, gives the City Council exclusive power to open, widen, etc., streets and prevent encroachments, provided that nothing therein contained should authorise opening roads, etc., through private property without complying with the provisions of any acts in force for awarding damages to any person injured thereby. A city by-law made under this section directed the city surveyor not to allow any erection facing on the street to project beyond the line of houses already built, or upon what has heretofore been considered a street, and when in doubt he was to be guided by Wright's plan. That plan represented defendant's fence as encroaching 14 feet on Sydney Street. The old fence had been removed and a new one built on the same site, but the 14 feet had been fenced and held by defendant since before the plan was made. Plaintiff contended that Section 50 gave the City Council supreme power to widen streets, remove fences, etc., and that the by-law made Wright's plan conclusive evidence of the position of the streets, and that anything represented on it as an encroachment must be so held. Defendant held more land than the quantity described in his grant, and it was urged that his lot must be limited to that quantity. *Held*, that Section 50 did not give the City Council the power claimed, and that under it the City Council must apply to the Lieut. Governor in Council for power to open new streets, etc., (2) that there was no encroachment, and that disputes respecting old boundaries are not decided so much by the metes and bounds according to the deed, as by what were the bounds actually laid down by the surveyor acting for the grantor. *PLEADWELL v. BURNAN*. 147

2.—*Appeal from City Court*—*General Trespas Act*, 12 Vic. c. 10, Sec. 14—*Nuisance*—Obstructing continuation of streets on the ice—*Variance*.] Under a by-law passed under a provision of the Incorporation Act empowering the Corporation to pass by-laws "to abate and cause to be removed all public nuisances," appellant had been fined £1 in the City Court for placing obstructions near Pownall

wharf, on such part of the ice as formed a public street and highway. The legality of the by-law being disputed, respondent also relied on the 12 Vic Cap. 16, Sec. 14, which imposes a penalty of £5 on all persons doing "spill or damage" to any public way, etc. The obstruction was off the line of the street, but on the ice where the winter road ran. The summons alleged that defendant placed an "obstruction on the public thoroughfare leading from Pownal Street to the Hillsborough River, the same being a public street of Charlottetown." The conviction was for placing the obstruction "upon the ice of Hillsborough River, within 100 feet of Pownal wharf, and on such part of said ice as formed a public highway from the river to Pownal Street, etc." *Held*, on appeal, that the case involved questions of public and private rights and of title, and was for a jury to decide, and was not within the jurisdiction of magistrates under the Trespass or of the City Court under the Incorporation Act, (2) that there was a material variance between the summons and the conviction. *DINN v. THE QUEEN* (*Carvell v. City of Charlottetown*). . . . 361

Child—Action for wages. *See* WAGES.

Chose in Action—Not assignable at law. *See* ABSENT DEBTOR. 2.

2.—Garnishee. *See* ABSENT DEBTOR. 6.

City Council—Powers. *See* CHARLOTTETOWN INCORPORATION ACT. 1.

"Coast"—Meaning in Township grants. *See* FISHERY RESERVES

Colonies—Bankruptcy in England—Protection. *See* BANKRUPTCY. 1.

Compensation for improvements. *See* LAND TAX SALE. 2.—Land Damages, *See* RAILWAY DAMAGES.

Condition — Re-entry. *See* ESTOPPEL. 2.

2.—To sail. *See* MARINE INSURANCE. 1.

Contract — *Breach* — *Bond for performance* — *Liquidated damages*—*Damages beyond*.] Defendants contracted to build a vessel for plaintiff by 1st Aug., and agreed to pay £4.10 a day for each day she was detained beyond that date. At the same time they gave plaintiff a bond and warrant of attorney, authorizing him to enter judgment against them for £700, conditioned to be void if the vessel was completed in time. The vessel was detained 105 days, which, at £4.10 a day, gave £472.10. Including this, the accounts showed £738 due plaintiff, and he entered judgment and issued execution for £700. *Held*, on motion to set judgment and execution aside, that the £4.10 a day were liquidated damages, but that the condition only applied to the non-delivery of the vessel, and not to breaches or damages beyond, and that the levy must be reduced. *LEFURGEY v. MCGREGOR & ANR.* . . . 272

2.—*Goods ordered to be "shipped and insured"*—*Placed on deck where policy did not cover them*—*Purchaser not liable for price of goods lost*.] Defendant ordered plaintiff to "insure and ship" him certain goods. Plaintiff insured the goods and shipped them, but they were placed, without his knowledge, on deck where the policy would not cover them, and they were lost. Plaintiff brought his action for the price of the goods. *Held*, that he must show that he not only shipped but also insured the goods so as to cover them in the part of the ship where they were placed, and, not having done so, there was no insurance and he could not recover. *ROOM v. LARGE* . . . 310

—With owners. *See* SHIPPING.

Construction — Statute. *See* EJECTMENT. 1.

—Statute abridging public right. *See* CERTIORARI.

—"Coast." *See* FISHERY RESERVES.

—Will. *See* WILL.

Convention of 1818 with United States. *See* MERCHANT SHIPPING ACT. 1.

Conveyance — Dead grantee. *See* ESTOPPEL. 1.

Corporation—Trespass—Parol demise by, void.] A Corporation demised by parol, for one year, land to F. Defendants entered and turned F. out and retained possession, and the Corporation brought an action of trespass against them in its own name, and was nonsuited on the ground that F. being tenant in possession the action should have been brought in his name. *Held*, on motion to set aside the non-suit, that as a Corporation could only demise under seal the parol demise to F. was void, and the Corporation was properly made plaintiff. *St. Andrew's College v. Griffin*. 80

Costs Plaintiff had obtained a verdict, but, not being satisfied with the amount, had it set aside and a new trial granted on the ground of insufficiency, costs to abide the event. At the second trial he again obtained a verdict, but for a smaller amount. *Held*, on taxation of costs, that plaintiff having failed to recover a larger amount on the second trial than on the first, was not entitled to the costs of the first trial. *McGill v. McWade*. 446
2.—See **ESTOPPEL**.

Court—Witness remaining in. See **WITNESS**, 1.

Credibility of witness—Estoppel. See **ESTOPPEL**, 2.

Criminal Information—Libel—Affidavit in reply—Practice.] Where the libel charges the person libelled with having, by a previous writing, provoked it, the latter by his affidavit, on which he moves for a criminal information, is bound to answer it, otherwise the affidavit is insufficient and the rule will be discharged. *Reg. v. Whelan*. 220

Criminal Information—Libel.] A party seeking a criminal information against another must himself be free from blame. *Reg. v. Whelan*. 223

Criminal Law—Indictment quashed because agent of prosecutor on Grand Jury.] The defendants were indicted for conspiracy to prevent C. from recovering his rents. W., agent of C., was on the Grand Jury which found the bill. A motion was made to quash the indictment on the ground that

W.'s position was such as to prejudice him against the accused, and therefore to render him incompetent to be on the Grand Jury. *Held*, that W. was incompetent and the indictment must be quashed. *Reg. v. Gorbet*. 262

Custody of Will—Evidence. See **WILL**, 2.

Cypres—Doctrine of. See **ESCHEMENT**, 1.

Damages must be proved in action for escape. See **ESCAPE**.
—See **CONTRACT**, 1.
—See **PETITION OF RIGHT**, 1.
—See **RAILWAY DAMAGES**.

Damming natural watercourses. See **RIPARIAN OWNER**.

Dead Grantee. See **ESTOPPEL**.

Death of Landlord—Tenancy at will. See **ESTOPPEL**, 1.

De bene esse—Examination. See **WITNESS**, 3.

Dedication to Public. See **RIGHT OF WAY**.

Deed—Replevin—Grantor may use same seal as notary attesting instrument—Dower—Rent—Variance.] A deed was executed before a notary whose seal was affixed at the bottom of the deed, opposite both his own and the grantor's names, and there was no other seal. Plaintiff's mother was alive and entitled to dower, and plaintiff avowed for the whole rent, and objection was taken that plaintiff was only entitled to two-thirds of the rent, and having sued for the whole there was a variance. The rent reserved was £5 a year and a ton of hay, and the averment only alleged the money to be due without acknowledging satisfaction for the hay, and it was contended that this also was a variance. *Held*, that the seal was sufficient, as more than one person might use the same seal, and that there was no variance on account of the dower, as until assignment the heir was entitled to receive the rent, and that the omission to acknowledge satisfaction for the hay was not a material variance, and if it was it should have been taken advantage of by special demurrer. *Compton v. Crossman*. 174

2—*Not delivered — Evidence—Laches.*] Where a conveyance has been executed by some of the parties but not by all, and there has been no delivery, it is not a deed and is not evidence against the parties who have executed it. Where plaintiffs had an agreement for a low rate of interest for a limited time, and after that time had expired rested on their rights for 17 years, they were held guilty of laches, and the Court would not allow them a higher even though a legal rate of interest for the 17 years. *POPE v. COMMISSIONER OF CROWN LANDS (CHANCERY).* 414

Deed, Sheriff's, void if land not described by metes and bounds. *See SHERIFF'S DEED.*

—Ordered by Court to be executed—Evasion of tender. *See ATTACHMENT.*

Deep Sea Fisheries. *See MERCHANT SHIPPING ACT, 1854. 1.*

Delivery of Deed. *See EJECTMENT. 3.*

Demise—Parol by corporation, void. *See CORPORATION.*

Demurrer. *See ESCAPE.*

—*See HIGHWAY ACT.*

—*See PLEADING.*

Description of Land. *See FALSA DEMONSTRATIO.*

Determinable Fee. *See EJECTMENT. 2.*

Discontinuance. *See ABSENT DEBTOR ACT. 4.*

Disqualification of Judge. *See JUDGE.*

Distress—Bailiff may use force necessary to ascertain if door is fastened. *MCKINNON v. MCKINLEY* 113

Doctrine of Cypres. *See EJECTMENT. 2.*

Domicile—Presumption of continued residence. *See STATUTE OF LIMITATIONS.*

Dower. *See DEED. 1.*

Duplicity. *See PLEADING.*

Ejectment—*Statute of Limitations—Tenancy at will converted*

into tenancy at sufferance—Construction of Statute.] A tenancy at will created and changed into a tenancy at sufferance before the passing of the Statute of Limitations is a bar under it, provided the tenancy at will and the tenancy at sufferance taken together have continued for 21 years without payment of rent or acknowledgment of title. *DOE. D., COLVILLE v. MARTIN* 83

2. — *Will — Perpetuity—Determinable fee—Wrong-doer — Doctrine of cypres.*] Captain J. McDonald devised lands to trustees in trust for his daughter Flora (then unmarried) for life, free from the control of any husband she might marry, and after her death in trust to permit the rents and profits to be laid out by guardians in bringing up the children of her first marriage until the eldest son of that marriage should attain the age of 30 years, and then to convey the lands to him in tail male. After testator's death Flora married and she and her husband remained in possession till his death in 1854, and she continued in possession till her death, intestate, in 1864. Plaintiff was their eldest son and over 30 years of age, and there was no conveyance from the trustees to him. D. McL., defendant's brother, had been in possession of the *locus* and paid rent to Flora and to plaintiff, and then abandoned when defendant entered. Defendant contended that the legal estate was in the trustees, and no demise being laid in their name, plaintiff must be non-suited. Plaintiff contended that the trustees took no estate under the demise; or, if any, only an estate in fee during Flora's life. *Held*, that the trust in favor of the eldest son was void for perpetuity, (2) that the other trusts having been executed and no further trust existing, the objects of the trust ceased, and therefore the trustees' estate also ceased and the plaintiff, as one of the testator's heirs, had a right to recover; (3) that plaintiff was entitled by prior possession to maintain ejectment against defendant, who was a wrong-doer; (4) that the doctrine of cypres would probably apply, and, if so, Flora would take an equitable estate tail, and on her death plaintiff would become legal tenant in tail, and as

such would be entitled to recover. *DOR. D., McDONNELL v. McISAAC* [363]

3.—Delivery — Marksman — Burden of proof of deed having been read is on party impeaching it. Defendant claimed, under a deed from F. Chiverie, plaintiff's son, that the grantor being illiterate the attestation clause should have stated it to have been read or explained to him, and unless this was proved to have been done the deed was void. Defendant stated that the subscribing witness, since dead, was his clerk at the date of the deed. Defendant did not remember if he himself was present when the deed was signed, or whether the grantor delivered it to him; he thought the grantor gave it to the subscribing witness, defendant's clerk, but in one of these two ways it came into his possession. The jury found for the plaintiff. *Held*, on motion to set aside the verdict, that the evidence did not warrant the finding; (2) that the rule that an illiterate person has a right to have a deed read or explained is subject to the qualification that he should require it to be read or explained, and the burden of proof lies on the party impeaching the deed. *DOR. D., CHIVERIE v. KNIGHT* . . . 448

Ejectment. See ESTOPPEL.

—See SHERIFF'S DEED.

—Credibility of witness. See ESTOPPEL. 2.

—See WILL. 2.

Encroachments—Streets. See CHARLOTTETOWN INCORPORATION ACT. 1.

Equity of Redemption. See LAND TAX ACT. 1.

Escape—Lieut. Governor may pardon prisoner, but his mere order would not justify a discharge from custody—Plaintiff must prove damage—Non-suit. The Queen's County Jailor, under an order from the Lieut. Governor, discharged a prisoner committed for stealing plaintiff's watch, but there was no pardon, and the plain-

tiff brought an action on the case against the Jailor for an escape. *Held*, that the Lieut. Governor had no power to discharge the prisoner, and his order would not justify the Jailor; (2) that an action would lie against the Jailor, but the plaintiff must prove his watch had been taken by prisoner, and not having done so must be non-suited. *MITCHELL v. HARVEY* . . . 64

2.—Limit bond — Demurrer. Prisoner was arrested by the defendant (Sheriff) under an execution, gave a limit bond under 13 Vic. Cap. 1, Sec. 1, was set at liberty before justification and continued at large. The sureties never justified, and an action of debt was brought against the Sheriff for escape. Defendant, on demurrer, contended that prisoner was lawfully at large under the authority of the Act, and that the only remedy against the Sheriff was for breach of the bond before justification, as pointed out by the Act. *Held*, that an action for escape could not be maintained, and the only remedy was that given by the Act. *BANK OF P. E. I. v. McDOWAN (Sheriff)*. . . 304

Escrow. See ESTOPPEL. 1.

Estoppel by acts—Ejectment—Escrow — Conveyance to dead grantee—Trespass. The locus had been granted to plaintiff, whose father agreed to give him a deed of a property called 'S.', provided plaintiff would convey the locus to his sister, defendant's wife. The father, to secure performance of this agreement, gave the deed of S. to his wife as an escrow, to be delivered to plaintiff on his conveying the locus to his sister. A deed from plaintiff to his father had been prepared in the latter's lifetime. After the father's death plaintiff obtained the deed of S. from his mother, at the same time executing and delivering to her the deed to his father, on the understanding that in pursuance of the agreement he thereby resigned his title to the locus to his sister. The jury found for defendant, and plaintiff moved for a new trial. *Held*, that plaintiff was estopped by his own acts from treating defendant as a trespasser. *McKINNON v. McKINNON* [10]

2.—*Ejectment — Condition of re-entry for want of property to distrain—Tenant denying to bailiff that there was property to distrain not estopped from showing the truth at the trial—His credibility a question for the jury.*] A bailiff was sent to search premises for property to distrain, and had also a demand in ejectment, under a condition of re-entry, to serve should no property be found. He found nothing, but on passing a hovel he asked defendant if there was any property there, and defendant said there was not, and the bailiff did not search it and served the demand. On the trial defendant admitted his former denial that there was property, but proved there was sufficient to satisfy half a year's rent. The judge held he was not estopped, and plaintiff submitted to a non-suit. *Held*, on motion to set the non-suit aside, that defendant was not estopped, but that the non-suit should be set aside on the ground that plaintiff had a right to have the credibility of defendant's testimony in contradicting his former statement submitted to a jury. *DOE D., STEWART v. MCPHEE* - 236

3.—*Ejectment—Death of landlord terminates tenancy at will—Ground not taken at trial—Costs.*] G. laid off lands in lots and streets (not dedicated to the public), and conveyed a lot fronting on Cedar Street to defendant. At defendant's request, G. pointed out his lot to him, and he built on the land so pointed out. G. had made a mistake and the land pointed out was really Cedar Street. G. told defendant so and wished him to move his house back, offering to pay the expenses. On defendant's not moving, G. told him he must move at his own expense. G. afterwards died, having devised his lands to plaintiffs, who brought this action to eject defendant. Defendant contended he was tenant at will and entitled to demand of possession; while plaintiffs argued that G.'s acts and declarations were themselves a determination of the tenancy. The judge charged the jury that if they found that G. had pointed out the land as alleged, his subsequent conduct was not sufficient to terminate the tenancy at will, and their verdict ought to be for defendant, and they so found. Plaintiff moved to set aside the

verdict for mis-direction, and also on the ground, not taken at the trial, that the tenancy at will was determined at G.'s death. *Held*, that the direction was right, (2) that G.'s death terminated the tenancy, and a new trial must be granted on that ground, but as it had not been taken at the trial, plaintiffs must pay the costs of the first trial. *DOE D., GREEN v. HIGGINS* - 466

4.—*Ejectment.*] G. had laid off land in building lots and streets, but there was nothing to show where the streets were situated, and they had not been dedicated to the public. He sold a lot described as fronting on Cedar Street to defendant, who, wishing to build, asked G. to show him his lot, and G. pointed out a plot and told him to build there. Defendant built on the land, but G. had made a mistake, as the land was really part of C. Street. Plaintiff wished defendant to move his house back, and on his refusal brought this action to eject him. The judge told the jury G.'s acts estopped him, and there was a verdict for defendant. Plaintiff moved to set the verdict aside for mis-direction. *Held*, that the direction was right and the plaintiffs were estopped. *DOE D., GREEN v. HIGGINS* - 496

—See WILL.

Evading tender ordered by Court.
See ATTACHMENT.

Evidence. See RIGHT OF WAY.
—See WILL. 2.
—See DEED. 2.

Falsa demonstratio—Description of land.] The land was described as commencing at a stake on the O'Leary Road, about 30 chains from M.'s northeast angle, when in fact the nearest point was not within 90 chains of M.'s northeast angle. *Held*, that the words "from M.'s northeast angle" could not be rejected as a *falsa demonstratio*; (2) that the location of the land could not be shifted from the locality described in a deed executed by the sheriff under the Land Assessment Act. *MCPHERSON v. RAMSAY* - 288

Fishery Reserves—Construction of term, "High water mark on the coast" in Township grants.] A reservation in a grant of land

from the Crown, of 500 feet from "high water mark on the coast," for the purpose of the fisheries only applies to land fronting on the sea coast, and in construing such a grant regard must be had to the purpose for which the reservation was made. *REG. v. COX* 170

Fishery—Public right to between high and low water marks. *See RIPARIAN OWNER.*

—Deep sea. *See MERCHANT SHIPPING ACT, 1854.*

Foreign Law—Proof of, *See BANKRUPTCY. 2.*

Forfeiture—Ship's register illegally obtained. *See MERCHANT SHIPPING ACT, 1854. 1.*

—Vessel's equipment. *See MERCHANT SHIPPING ACT, 1854. 2.*

Fraud—General allegation. *See PLEADING.*

—By government official. *See PETITION OF RIGHT. 2.*

Freight pro rata. *See MARINE INSURANCE. 3.*

Garnishee—Service of Ab. Dr. summons on. *See ABSENT DEBTOR ACT. 3.*

General Trespass Act. *See CHARLOTTETOWN INCORPORATION ACT. 2.*

Goods to be "shipped & insured." *See CONTRACT, 2.*

Government Official—Fraud by, *See PETITION OF RIGHT. 2.*

Grand Jury—Agent of prosecutor on. *See CRIMINAL LAW.*

Grand Juror—Foreman of coroner's jury on. *See MURDER.*

Grantee, dead—Conveyance to. *See ESTOPPEL. 1.*

Grantor using same seal as notary attesting instrument. *See DEED. 1.*

Ground not taken at trial—New Trial. *See ESTOPPEL. 3.*

Highway Act—14 Vic. cap. 1, sec. 16—*Information—Demurrer.*] An information for preventing the opening of a road directed to be laid out by the Governor in Council, under 14 Vic. cap. 1, sec. 16, must allege that the road ran through

defendant's land, *ATTORNEY-GENERAL v. WESTAWAY* 114

"High Water Mark on the coast"—Meaning of in Township grants. *See FISHERY RESERVES.*

High and Low Water Marks—Erections between—Public rights. *See RIPARIAN OWNERS. [4]*

Ice—Obstructions on. *See CHARLOTTETOWN INCORPORATION ACT. 2.*

Improvements—Compensation for. *See LAND TAX SALE.*

"Inadequacy of Maintenance"—Construction. *See WILL. 1*

Indictment—Agent of prosecution on Grand Jury. *See CRIMINAL LAW.*

Injunction—Must be actual injury as well as legal right. *See RIPARIAN OWNER. 2.*

—Penning back water. *See RIPARIAN OWNER. 3.*

Insolvent Relief—Assignment by insolvent under pressure, after service of process, does not deprive him of right to weekly allowance. *IN RE GEO. MCKAY* 278

Insolvency—*Undue preference—pressure.*] An insolvent before the Act of Insolvency gave one of his creditors a Bill of Sale to secure a debt already due, the creditor having demanded the security and threatened arrest if it was not given, and having held out hopes that he would advance the insolvent further supplies if the security was given. *Held*, not an undue preference having been given under compulsion; to make out undue preference the security must appear to have been voluntary. *IN RE ROBERT BELL* 301

Insurance. *See MARINE INSURANCE.*

Interlineation of Will. *See WILL. 2.*

Interim protection—English bankruptcy. *See BANKRUPTCY. [1.]*

Intestacy. *See PARCENERS.*

Irregularity—Service of summons. *See ABSENT DEBTOR ACT. 3.*

Judge interested in another action on similar facts against same defendant, disqualified—Query.] Objection was taken to a judge trying a cause on the ground that he was a shareholder in a bank which had a case against same defendant, in which the same questions would arise and the same evidence be given as in this case, and as such shareholder was interested in the result of the present action and therefore disqualified. The Court being divided in opinion the judge declined to try the case. *HODGSON v. DAWSON* - 282

—Discretion to allow examination of witness remaining in Court after order to withdraw. *See WITNESS. 1.*

Judgment, as in case of non-suit—Not proceeding to trial. *See NON-SUIT.*

—Binding land — Unregistered deed. *See REGISTRATION ACT.*

Jurisdiction of J. P.'s respecting seamen's wages—Accounts exceeding £50. *See MERCHANT SEAMAN ACT.*

Juror—Affinity. *See NEW TRIAL*

Justice of the Peace—Affinity to principal — Conviction of agent set aside. *See AFFINITY.*

Jury de mediatate Linguae—If the right to a jury *de mediatate linguae* ever existed in P. E. I. it is abolished by the Island Jury Act. *REG. v. THOMPSON* - 226

Laches. *See RIPARIAN OWNER. 2*

—*See DEED* not delivered. 2.

Land Tax Sale—Redemption—Owner and Purchaser—Compensation for improvements.] The Land Assessment Act, 11 Vic. cap. 7, sec. 12, gave the owner of land sold for non-payment of taxes the right to redeem within two years, on repayment of the purchase money with interest and all reasonable expenses and a fair allowance for improvements. The purchaser, Pope, was owner of the dower, and at the time of sale was in possession under an agreement to purchase. Application was made to have the redemption money ascertained, and on repayment to compel purchaser to re-convey. Pope claimed compensation for improvements,

viz., ploughing, fencing, and erecting a house. *Held*, that the purchaser, until the expiration of the two years, being only an equitable mortgagee, is entitled to allowance for necessary repairs, but not for other improvements except under special circumstances, and no necessity having been shown in this case they could not be allowed; (2) that, as owner of the dower, defendant was himself bound to pay one-third of the purchase money, and on payment of the balance must execute a conveyance to plaintiff. *COMPTON v. POPE* 181

Lands—Taken in execution, not sold—Poundage. *See SHERIFF'S FEE.*

Land Tax Act—11 Vic. cap. 7, sec. 12—Powers of Supreme Court—Equity of redemption—Application to redeem—Charges disallowed.] On an application to redeem land sold under the Act, defendant claimed to be allowed for clearing land, attending sale, attending to register deed, attending to pay land tax, surveying, etc., and he also contended that the Supreme Court had no jurisdiction, but that plaintiff must resort to the Court of Chancery. *Held*, that the Supreme Court had jurisdiction; (2) that during the two years purchaser could not commit waste or claim remuneration for improvements which a mortgagee in possession could not claim, and therefore the charge for clearing could not be allowed; (3) that the charges for attending the sale and to pay land tax could not be allowed in any case; (4) that the charge for surveying and attending to register could not be allowed except supported by positive allegations in defendant's affidavit. *SULLIVAN v. RAMSAY* - 209

2.—*Tender of redemption money within two years sufficient—Rule to redeem may be taken out later—Legal tender.]* Plaintiff's land was sold on 30th Sept., 1859, and bought by defendant. The affidavit of plaintiff's agent stated that the redemption money was tendered on 24th May, 1861, and the rule to redeem taken out 7th Jan., 1862. Defendant showed no money was produced and no offer made which would amount to a legal tender. *Held*, sufficient to satisfy the Statute if the tender

was made within the two years, even though the rule was not taken out until the two years had expired; (2) that an actual tender may in all cases be necessary, yet where no offer is made which could amount to a legal tender of any amount, a rule to redeem must be discharged. *SULLIVAN v. RAMSAY* [215]

3.—*Redemption—Tender when purchaser has recently assigned.*] C. bought at land-tax sale and subsequently conveyed to R., but no notice of the conveyance was given the former owner. R. lived with his mother, who had been the lessee and should have paid the tax, and C. was her son-in-law. DeBlois, S.'s agent, tendered the redemption money to C. subsequently to the latter's conveyance and in ignorance of it, but it was refused. C. and his brother, in their affidavits, asserted that DeBlois, when making his tender, did not express that he was making it for plaintiff and did not refer to him as owner of the land. Hence, it was insisted the tender was bad. It was clear that C. knew plaintiff was owner. *Held*, that the tender was good and the plaintiff entitled to redeem, notwithstanding the assignment to R. *SULLIVAN v. RAMSAY* 228

Land damages—Railway. See PETITION OF RIGHT. 1.

Lands—Compensation for severance. See RAILWAY DAMAGES.

Law, foreign — Proof of. See BANKRUPTCY. 2.

Legal tender. See LAND TAX ACT. 2.

Liability of Carrier—Article in passenger's custody. See CARRIER.

Libel. See CRIMINAL INFORMATION. 1, 2.

Lieut. Governor — Power to pardon, not to order discharge of prisoner. See ESCAPE. 1.

—in Council—No power under 15 Vic. cap 34, sec. 12, to impose rates on boats or passengers using wharf. See CERTIORARI.

Limitations. See STATUTE OF LIMITATIONS—EJECTMENT. 1.

Limit Bond. See ESCAPE. 2.

Liquidated damages. See CONTRACT. 1.

Loss — Constructive total. See MARINE INSURANCE, 2.

—Partial. See MARINE INSURANCE. 2.

Marine Insurance—Condition to sail not later than 15th Dec.—Underwriter not liable if vessel sails on 17th Dec., though lost outside prohibited waters.] By a policy dated 4th April, defendants insured plaintiff's ship for ten months, with liberty to sail from Charlottetown not later than 15th Dec. Except this liberty the vessel was not allowed to be in the Gulf of St. Lawrence after 15th Nov. without payment of additional premium and leave first obtained, which was not done. The ship sailed from Charlottetown on 17th Dec., passed safely out of the Gulf and was afterwards lost on the English coast. *Held*, that the contract was to insure the vessel on condition that she sailed from Charlottetown not later than 15th Dec., that time was of the essence of the contract, and the conditions not having been performed, plaintiffs could not recover. *DUNCAN v. BRITISH AMERICA INS. CO.* 370

2.—*Partial loss — Abandonment — New trial.*] Plaintiffs shipped a cargo of fish to the West Indies, but the vessel was caught in the ice and remained there all winter, whereby the cargo was damaged. She got to Halifax in May, the owners gave the underwriters notice of abandonment, the captain sold the cargo for the benefit of all concerned, and the plaintiffs claimed for a constructive total loss. The fish were re-dried by the purchaser and shipped to the West Indies, and, though discolored, were not much injured. The jury found a total loss. *Held*, on motion for a new trial, that the finding was wrong, the loss being partial and not total, and that there must be a new trial. *HEARD & HALL v. P. E. I. MARINE INS. CO.* [381]

3.—*Voyage partly accomplished—Freight pro rata — Salvage.*] The vessel was owned by Heard and the cargo by Heard and Hall jointly. The cargo was insured from Charlottetown to Cuba. The vessel and cargo, having received sea damage, put into Halifax,

where the master sold the cargo for the benefit of all concerned, and the proceeds of sale were received by plaintiffs, who, under the head of salvage, claimed to retain therefrom freight *pro rata* in Halifax. The jury found damages for plaintiffs to the full amount of their claim. *Held*, on motion to reduce damages, that the owners of the goods on adjustment could not make this salvage claim, and the damages must be reduced. **HEARD & HALL v. MARINE INS. CO.** 428

Marksman—Proof. See ERECTMENT. 2.

Master of Ship—His powers. See SHIPPING.

Meaning of "high water mark on the coast." See FISHERY RESERVE.

Merchant Seamen Act.—28 Vic. cap. 18, sec. 22—Jurisdiction of two Justices up to £50.—Enquiry into accounts exceeding £50 to ascertain balance.] The Merchant Seamen Act gives two Justices jurisdiction in actions for wages up to £50. Plaintiff sued for a balance of £15.15. To ascertain the balance the justices had to enquire into the amount of his wages during his whole service, which exceeded £70. An application was made to set aside their judgment for excess of jurisdiction. *Held*, that the judgment below must be sustained. **BOOCHS v. ATWARD.** [225

Merchant Shipping Act, 1854—Deep sea fisheries—Convention of 1818 with the United States—Ship sailing under certificate illegally granted liable to forfeiture.] E. Marshall, a citizen of the United States, in 1857, built the "S. G. Marshall," and, knowing he could not get a British register in his own name, took his son, a boy of eight years, to the registrar's office, where he had the builder's certificate filled up, stating E. Marshall, junior, (the son) to be the owner, he himself signing as builder. The declaration of ownership was also filled up with the name of E. Marshall, junior, who signed by his mark. The boy's real name was E. H. Marshall, and he was a British subject. The vessel was always navigated under the register so obtained, E. Mar-

shall, the father, commanding her. In 1870 she was seized while fishing about 800 yards from shore, by the captain of one of H. M. ships engaged in protecting the fisheries. *Held*, that the vessel was liable to forfeiture for sailing under a register illegally issued, flying the British flag, and falsely assuming the British national character. **REG. v. THE SCHR. "S. G. MARSHALL"** 316

2.—*Vessel, "her tackle, apparel and furniture," includes her equipments necessary for the purposes of her voyage and adventure—Forfeiture.]* Under the general order of the Vice Admiralty Court for the sale of the "S. G. Marshall," "her tackle, apparel, and furniture," the defendant, who was marshal of that Court, sold a seine, lot of barrels, salt, bait, bait-mills, nets, and a seine boat, which she had on board, though not mentioned before the Vice Admiralty Court, nor any judgment given against them specifically. Plaintiffs, who were joint owners of these articles, and of all the other outfit on board, brought an action of trespass against defendant. A verdict was found for plaintiffs and leave given defendant to move to set it aside and to enter a verdict in his favor. *Held*, (Hensley, J., dissenting) that the articles were part of the ship's "tackle, apparel, and furniture," and that the verdict must be entered for defendant. **HALL & MARSHALL v. YATES** 331

Motes and bounds—Sheriff's deed must give. See SHERIFF'S DEED.

Murder—Motion for new trial—(Grand juror foreman of coroner's jury which returned verdict of murder against the prisoner.) Prisoner had been found guilty of murder. His counsel moved for a new trial, or to arrest judgment, on the ground that W., one of the Grand Jury which found the bill against him, had previously acted as foreman of the coroner's jury which had returned a verdict of murder against the prisoner. The same objection had been taken before the jury were sworn. *Held*, that, as the objection did not affect the justice of the proceeding, the application must be refused. **REG. v. DOWDY** 334

Navigation — Public right between high and low water marks. *See* RIPARIAN OWNER [4]

Negligence in proceeding to trial. *See* NONSUIT.

New Streets — City Council's power to open. *See* CHARLOTTETOWN INCORPORATION ACT. 1.

New Trial — *Juror -- Affinity.*] A verdict had been found for defendant. The foreman of the jury was married to a sister of defendant's wife. *Held*, on motion to set aside the verdict and for a new trial on the ground of affinity, that the foreman was disqualified and there must be a new trial. *BEVAN v. McLEOD* 297

— *See* MARINE INSURANCE. 2.

— Rule nisi need not set out grounds. *See* GREEN *v.* HIGGINS 466

Nonsuit—*Judgment as in case of -- Negligence.*] Where defendant seeks to obtain judgment as in case of non-suit for not proceeding to trial according to notice, plaintiff, to prevent it, must shew that his not proceeding to trial was not caused by his own negligence. *DOE D., WIER v. SHAW* . . . 189

Notary attesting deed -- Grantor using same seal. *See* DEED. 1.

Notice of Assignment — Insufficient. *See* ABSENT DEBTOR ACT. [2.]

Nuisance—Erection on seashore. *See* RIPARIAN OWNER. 4.

Obstructing continuations of streets on ice. *See* CHARLOTTETOWN INCORPORATION ACT. 2.

Official, Government—Fraud by. *See* PETITION OF RIGHT. 2.

Old boundaries—Streets. *See* CHARLOTTETOWN INCORPORATION ACT. 1.

Order locating schoolhouse within three miles of another. *See* BOARD OF EDUCATION.

—to "pay bearer," addressed to no one, not an assignment unless shown to be so intended. *See* PETITION OF RIGHT. 2.

Owner. *See* RIPARIAN OWNER.

—and purchaser — Redemption. *See* LAND TAX SALE.

—of ship. *See* SHIPPING.

Panel—Special jury—Set aside. *See* SPECIAL JURY.

Parceners—*Tenancy from year to year.*] Children of a deceased tenant from year to year are coparceners or tenants in common, and the widow of the deceased tenant has no power to dispossess them. *McINTYRE v. McINTYRE* [500]

Pardon—Governor can pardon prisoner, but his mere order will not justify jailor in discharging him. *See* ESCAPE. 1.

Parol demise by corporation void. *See* CORPORATION.

Partial loss. *See* MARINE INSURANCE. 2.

Parties, both resident abroad—Temporarily within jurisdiction. *See* ABSENT DEBTOR ACT, 5.

Passenger—Loss of article in custody of. *See* CARRIER.

Penning back water. *See* RIPARIAN OWNER. 3.

Performance of Contract—Bond — Damages. *See* CONTRACT.

Perpetuity. *See* EJECTMENT. 2.

Petition of Right — *Railway Act—Land damages—Reasonable time -- Reference to independent parties when masters disqualified.*] The Railway Act empowered commissioners to deprive private persons of property required for railway purposes. If dissatisfied with the compensation awarded, such person could apply to a board of appraisers to be appointed for the whole Island, to assess the damages, who were to give notice of the time when they would examine the land and assess the damages, and sec. 14 enacted that they should "transmit the assessment to the Lieut. Governor in Council, who should direct payment to be immediately made." The Government, instead of appointing one Board for the whole Island, had appointed three, and it was only two days

before the hearing that one general Board was appointed. On 6th Oct., 1871, the Commissioners entered upon part of petitioner's land, and it became vested in the public for railway purposes. On 8th Feb., 1872, petitioner made his claim on the Commissioners for compensation, who, on 9th April, awarded him \$259.55. Being dissatisfied he, on 17th April, applied to the appraisers to ascertain the amount of compensation, but they failed to give the required notice, and he commenced this suit on 6th May. The Government sent in their resignation on 18th April, which was accepted on 22nd April, and on the same day the resignation of the appraisers was accepted and no new ones appointed until 1st May. All the Masters were disqualified, and therefore no reference to ascertain the amount of compensation could be made to them if the matter was not referred to the board of appraisers. *Held*, (by the M. R.) that there had been unreasonable delay on the part of the Government, and that at the time the action commenced there was no legal board of appraisers; (2) that a commission should issue to five independent persons to assess the amount of compensation and to return their proceedings to the Court, when it would be open to either party to take exception to the return in the same manner as to a Master's report. **DEBLOIS v. THE QUEEN** - - - 398

2.— *Fraud by Government official—Order addressed to no one to "pay bearer" amount of salary due from Government, not an assignment unless it was shown to have been intended as such.*] The 33 Vic., cap. 12 directed the Governor in Council, after certain preliminary conditions had been complied with, to issue treasury warrants, payable to the Colonial Treasurer, to be applied towards paying teachers' salaries, and that the Clerk of the Council should draw orders for these several amounts of the salaries on the Treasurer, who should pay them on presentation. Instead of following the Act the Government gave McN., Secretary of the Board of Education, cheques payable to bearer whereby he was enabled to defraud both Government and individuals out of large sums. In Bradley's case the trustees' certificate was dated

in August, and had an endorsement in McN.'s handwriting, dated 5th Sept., as follows, "Pay J. McN. or order," signed by Bradley. When Bradley came for his money McN., instead of a cheque, filled up an order, addressed to no one and which Bradley signed, to "pay bearer" his salary, and told him to go to H., who would give him his money, and if there was any discount he (McN.) would pay it, and H. having charged \$1.50, McN. paid it to Bradley. On the same day Bradley endorsed the trustees' certificate, but could not remember if the words, "Pay J. McN. or order," were there when he signed. Bradley said he considered himself paid by McN. The action, though in Bradley's name, was really by H., who claimed as his assignee. The Government contended that petitioner had been paid by McN., the official appointed to pay him, and that no assignment was made by him to H. *Held*, no assignment, and that an order of the nature given was not an assignment unless shown to have been so intended; (2) that the case was properly cognizable in equity and not at law. **BRADLEY v. THE QUEEN** 454

Pleading—Duplicity — General allegation of fraud—Amendment after demurrer argued—Demurrer.] To a declaration on a fire insurance policy, defendants pleaded *non actio*, because plaintiff did not send in as particular an account of the loss as alleged and in the same plea added "nevertheless for a plea in this behalf," alleging fraud in general terms. To this there was a special demurrer on the grounds of duplicity and that the allegations of fraud were too general. *Held*, no duplicity, the real plea being fraud, and that the traverse was an introductory part of the plea, and was waived as a defence; (2) that the charge of fraud was sufficiently specific, as the alleged fraud was within the knowledge of the opposite party; (3) that plaintiff might withdraw his demurrer and reply. **HASZARD v. THE CHARLOTTETOWN MUTUAL INS. CO.** - - - 275

Poor relations—Under 14 Vic., cap. 7, a son-in-law is not liable to support his wife's father. **IN RE M. BRENAN** - 47

Possession—Unity of, does not extinguish right. *See* RIPARIAN OWNER. 2.

Poundage. *See* SHERIFF'S FEES.

Power of master of ship. *See* SHIPPING.

—of City Council to open and widen streets. *See* CHARLOTTE-TOWN INCORPORATION ACT. 1.
—of Supreme Court—Rule to redeem. *See* LAND TAX ACT. 1.

Practice—*Writ dated on Sunday.*] A writ of summons dated on Sunday is void, and a judgment and subsequent proceedings thereon will be set aside and date of the summons is not amendable. *McKINNON v. PROUD* - 474

—*See* CRIMINAL INFORMATION.

Preference—Undue. *See* INSOLVENCY.

Pressure — Undue preference. *See* INSOLVENCY.

Presumption—Continued residence in place of domicile. *See* STATUTE OF LIMITATIONS.

Priority — Judgments binding land—Unregistered deed. *See* REGISTRATION ACT.

Proof of foreign law. *See* BANKRUPTCY. 2.

—burden of—Marksmen. *See* EJECTMENT. 3.

Public Convenience. *See* RIPARIAN OWNER. 2.

— Wharf — Statute abridging public right. *See* CERTIORARI.

— Right — Statute abridging. *See* CERTIORARI.

Purchaser — Redemption. *See* LAND TAX SALE.

—ordering goods to be “shipped and insured,” not liable if goods lost, if placed where policy did not attach. *See* CONTRACT. 2.

Quare clausum fregit—Trespass. *See* CORPORATION.

Quashing special jury panel *See* SPECIAL JURY.

—Indictment—Agent of prosecutor on Grand Jury. *See* CRIMINAL LAW.

Railway damages—*Compensation for severance of lands.*]

Petitioner excepted to report of commissioners appointed by the Court of Chancery to ascertain the amount of compensation due him in respect of land taken for railway purposes and which severed his remaining lands. The Railway Act provided for a fence being maintained along the railway by Government, but made no provision for a crossing for the person whose lands were severed, or for gates, etc., and the commissioners had not considered this. *Held*, (by the M. R.) that petitioner was entitled to compensation to be estimated at the cost of providing and maintaining a crossing, gates, etc.; (2) that though the land was dedicated to the public it was for a specific purpose, and the right of the public to its use was restricted to that purpose. *DEBLOIS v. THE QUEEN* - 434, H. L. 398

—*See* PETITION OF RIGHT.

Reasonable time. *See* PETITION OF RIGHT. 1.

Redemption. *See* LAND TAX SALE—LAND TAX ACT.

Re-entry. *See* ESTOPPEL. 2.

Reference—Chancery —Masters disqualified. *See* PETITION OF RIGHT. 2.

Register illegally issued. *See* MERCHANT SHIPPING ACT. 1.

Registration Act—*Judgments binding land—Prior unregistered deed.*] In May, 1856, L. conveyed lands to J., but the deed was not registered until April, 1860. Subsequent to the execution of the deed, but before registration, judgments were recovered in the Supreme Court against L., but no memorial was registered. In 1859 defendant exchanged these lands for lands of the plaintiff, and a good, clear title was to be given. Defendant tendered a deed, which plaintiff refused to accept, on the ground that the judgments recovered against L., previous to the registration of the deed from him, affected the title. *Held*, that, as no memorials had been recorded, the judgments did not bind the land. *REDDIN v. JENKINS* . 232

Rent — Dower — Replevin. *See* DEED. 2.

Replevin - Rent. See DEED. 2

Reserves. See FISHERY RESERVES.

Right of Way-- *Appeal—Dedication to public—Evidence.*] In 1851 P. laid out a street and in 1853 conveyed a building lot to defendant, and in 1854 laid off several new streets in the same block. Defendant removed a fence placed by plaintiff, a lessee of P.'s, across one of the new streets, and an action was brought against him for doing this. *Held*, that there was no dedication to the public, and as defendant's deed was given before the street was laid off, there was no implied agreement between P. and defendant to grant him a right of way. *CALLAGHAN v. HOBKIRK.* 178

—Between high and low water marks. See RIPARIAN OWNER. [4.]

Right of Navigation and Fishery—Between high and low water marks See RIPARIAN OWNER. 4.

Right—Action lies for continued invasion without actual damage. See RIPARIAN OWNER. 1.

—Infringement — Injunction not granted unless actual injury shown. See RIPARIAN OWNER. [2.]

—See PETITION OF RIGHT.

Riparian Owner — Rights — Damming natural watercourse—*Action lies for injury to or invasion of rights of owners below, though no actual injury sustained.*] The running water of a natural stream is public property, which no one has a right to interrupt, and though slight detentions may not be actionable, yet substantial and continuous interruptions are, even without actual damage to parties below, because if suffered for twenty years the right to continue them would be acquired. When defendant has been in the habit of detaining the water whereby its flow to plaintiff's mill was interrupted, plaintiff is entitled to nominal damages for the injury to his right. *HOWATT v. LAIRD* 7

2.— *Right to natural watercourse not extinguished by unity of possession — Injunction not*

granted in all cases where plaintiff would succeed at law—Actual injury must be shown—Public convenience—Laches or acquiescence in encroachment—Injunction dissolved in part.] A riparian owner's right to the interference of the Court of Chancery by Injunction to protect rights from invasion, rests not merely on his showing a bare legal right or on his having obtained a verdict establishing it, but on his also showing an interruption of that right attended with such actual loss or inconvenience to him as on equitable principles should be prevented, and his own laches and the public convenience ought to be considered; and unity of possession does not extinguish a right to a natural watercourse. *HOWATT v. LAIRD* (Chancery) 21

3.—*Penning back water—Injunction.*] An injunction lies for injury to riparian right without actual damage so as to preserve the right, but in interfering the Court will consider not only the strict legal rights of the parties, but all surrounding circumstances, the injury the strict enforcement of the right would cause defendant, etc. An injunction was granted some years before restraining defendant from penning back water for his mill, which was above plaintiff's, on same stream, between the hours of 4 a. m., and 11 p. m., each day. It appearing that to allow defendant to pen back the water between 10 p. m., and 6 a. m., would not injure plaintiff's right, the Court dissolved the injunction so far as it related to penning back the water between these hours, but in all other respects made it perpetual. *HOWATT v. LAIRD* (Chancery) 157

4.— *Sea shore — Nuisance — Right to make erections between high and low water marks—Seaweed—Public have right of navigation and of fishery over soil, but not absolute right of way.*] The riparian owner has a right in common with the public to take seaweed when floating in the sea, and has the exclusive right to it when deposited on the shore, and to avail himself of that right may use such contrivances as he likes, so long as he does not practically interfere with the rights of the public on the shore. The public right

over the space between high and low water marks is not an absolute right of way, but is the right of navigation and fishery. Even assuming the public have such absolute right of way, yet the use of the space is not limited to that right, and so long as the public right is not injured the riparian owner has a right to make such erections as he requires for the purposes of collecting seaweed, etc. **REG. v. LORD** . . . 245

Rule to redeem—Need not be within two years, if tender made in time. See **LAND TAX ACT. 2.**

Salvage. See **MARINE INSURANCE. 3.**

Schoolhouse—Within 3 miles of another. See **BOARD OF EDUCATION.**

School rate. See **BOARD OF EDUCATION.**

Seal—Grantor using same as notary attesting instrument. See **DEED. 2.**

Seamen—Wages—Jurisdiction of J. P.'s. See **MERCHANT SEAMEN ACT.**

Seashore. See **RIPARIAN OWNER. 4.**

Seaweed—Right to. See **RIPARIAN OWNER. 4.**

Severance of lands—Compensation. See **RAILWAY DAMAGES.**

Sheriff's deed under 11 Vic., cap. 7—Want of notice cured by sec. 22—Void, if land not described at sale by metes and bounds.] The 11 Vic., cap. 7, sec. 7, enacts that before proceeding to sell land taken in execution under that Act, the sheriff shall at the sale publicly declare the metes and bounds. Sec. 22 enacts that no omissions of any direction relative to notice or forms shall render the sale invalid. The locus was sold by the sheriff and bought by Y. for a trifling sum. Notice of sale had not been duly given by the sheriff, and at the sale the land had not been described by metes and bounds. Y. brought ejectment and obtained a verdict. *Held*, on motion to set

the verdict aside, that the want of notice being in a proceeding previous to the sale, was cured by sec. 22, but that the want of description by metes and bounds was a defect not cured by sec. 22, and rendered the sale invalid. **DOE D., YEO v. BETTS** . . . 116

Sheriff's fees—*Lands taken in execution but not sold—Poundage.*] Where a sheriff extended an execution on lands of a judgment debtor, but the debt was settled and the land not sold, he is entitled to his expenses but not to poundage. **CRESWELL v. HUNT** . . . 191

2.—*Poundage.*] The P. E. I. Statute 16, Geo. III., cap. 1, allows the sheriff poundage "for levying, paying and receiving" moneys under execution. Under this provision he must not only levy, but actually sell, receive and pay over the purchase money before he is entitled to poundage. **COX v. MURPHY** . . . 412

Ship—Certificate illegally issued. See **MERCHANT SHIPPING ACT. [1.]**

"Shipped & insured"—Goods placed where policy did not attach—Purchaser not liable on loss, See **CONTRACT. 2.**

Shipping—*Contract with owners—Master's powers.*] The master of a ship has no express or implied power to alter or vary a contract made directly with the owners. **PERRY v. P. E. I. STEAM NAV. CO.** [476

—See **MERCHANT SHIPPING ACT.**
Son-in-law—Not liable to support father-in-law. See **POOR RELATIONS.**

Special Jury—*Application to quash panel—Panel set aside for partiality of officer returning it—Affidavit in support of application to set aside must be certain.*] When an application was made to set aside a special jury panel on the ground of the partiality of the officer returning it, the Court will set the panel aside, although there could be no technical challenge to the array, and a new panel will be returned by another officer under the direction of the Court. The party applying to have the panel set aside must set out the grounds of

his application with certainty in his affidavit. *McLEAN v. WHELAN* [135]

Statute of Limitations—*Absence from country without receiving rents, etc., not necessarily a discontinuance of possession—Presumption of continued residence in place of domicile.* W. W. owned the Retreat Farm. He left P. E. I. in 1805, leaving his son R. W., through whom plaintiff claimed, in possession, and never returned. On 3rd May, 1806, W. W. conveyed to K., a resident of England, who in 1810 conveyed to D. R., who died in 1823, never having been on P. E. I., and the farm became the property of D. S. R., who came to the Island in 1839. In 1842 he conveyed the farm to defendant, who entered into possession of part of it, but R. W. continued to reside on the remainder until the end of 1846, when he removed and subsequently died. T., sister of R. W., sought to recover the farm on the ground that he had acquired a title by possession. *Held*, that W. W. was in possession until May, 1806, when he conveyed to K., and the Statute did not begin to run until then; (2) that K. being a resident abroad, the presumption, in the absence of evidence to the contrary, is that he remained there and that the disability of absence was not removed, and that, therefore, he or those claiming under him would not be barred until the lapse of 40 years, and as O. entered in 1842, R. W. never acquired a title. *DOE D. TULLIDGE v. ORR* - - - 108

—Construction. *See* EJECTMENT.

Statute—Abridging public right. *See* CERTIORARI.

Streets — Encroachments. *See* CHARLOTTETOWN INCORPORATION ACT 1.

—City Council's power to open, &c. *See* CHARLOTTETOWN INCORPORATION ACT 1.

—Continuations on ice—obstructions. *See* CHARLOTTETOWN INCORPORATION ACT 2.

Summary Action — *Part payment. Action lies for balance.* Under a statute permitting a plaintiff to proceed in a summary way when the debt or damages do not

exceed £20, he may proceed in a summary way to recover a balance not exceeding £20, although the original claim may have been greater. *PIDWELL v. McDONALD*. 46

Sunday—Writ dated on. *See* PRACTICE.

Supreme Court—Power on application to redeem. *See* LAND TAX ACT 1.

“Tackle, Apparel, & Furniture” of vessel. Includes equipments necessary for purposes of the voyage and adventure. *See* MERCHANT SHIPPING ACT 2.

Tenancy—At will converted into tenancy at sufferance. *See* EJECTMENT. 1.

—at will—Terminated by death of landlord. *See* ESTOPPEL. 3

—from year to year—Intestacy. *See* PARCENERS.

Tenant—denying property to discharging bailiff, not estopped at trial. *See* ESTOPPEL. 2

Tender—Legal. *See* LAND TAX ACT. 2.

—Redemption money within two years. *See* LAND TAX ACT. 2

—when purchaser has recently assigned. *See* LAND TAX ACT. 3.

—Deed ordered by Court to be executed—Evasion. *See* ATTACHMENT.

Trespass—*See* ESTOPPEL.

—quare clausum fregit. *See* CORPORATION

—*See* MERCHANT SHIPPING ACT. 2.

Trover—*See* CARRIER.

Trustee Process—*See* ABSENT DEBTOR. 2.

Uncertainty—*See* AWARD.

Undue Preference — *See* INSOLVENCY.

Underwriters—Condition to sail not later than fixed date—Not liable if vessel sails after that date though lost outside the prohibited waters. *See* MARINE INSURANCE. 1.

United States—Convention of 1818. *See* MERCHANT SHIPPING ACT. 1.

Unity of Possession—Does not extinguish right to natural watercourse. *See* RIPARIAN OWNER. 2.

Variance—*See* DEED. 1.

"Vessel"—Term does not embrace boat. *See* CERTIORARI.

—her "tackle, apparel, furniture." *See* MERCHANT SHIPPING ACT. 2.

Vice Admiralty Court. *See* MERCHANT SHIPPING ACT. 1.

Voyage partly accomplished — Freight. *See* MARINE INSURANCE. 3.

Wages—Action by son for—*Circumstances showing some remuneration intended, though amount to be fixed by father.*] The defendant's sons had worked in his shipyard after coming of age without any express agreement for wages, but defendant had given them what he thought right as they left him, and when plaintiff left, defendant offered him land worth £100, which plaintiff refused. Plaintiff then sued his father and obtained a verdict for £100. On motion for a new trial, defendant contended that plaintiff must have an express agreement to pay wages, and not having done so, could not recover. *Held*, that the circumstances rebutted the presumption that the services were gratuitous, and showed clearly that some recompense was intended and that plaintiff was entitled to recover the amount of the verdict. *WHITE v. WHITE.* - 75

—Seamen's — Jurisdiction of J. Ps. *See* MERCHANT SEAMEN ACT.

Waiver. *See* ABSENT DEBTOR Act. 1.

Watercourse—Public right. *See* RIPARIAN OWNER.

—natural —Right not extinguished by unity of possession. *See* RIPARIAN OWNER. 4.

Wharf—Statute abridging public right to. *See* CERTIORARI.

Will—"Inadequacy of maintenance."—*Estoppel.*] Lands were devised by defendant's father to him, charged "with the support of his daughter Phoebe (one of the complainants then unmarried), in a manner suitable to her station in life." In case of dispute as to the "Inadequacy of the maintenance," testator directed £40 a year to be paid her in lieu thereof. Phoebe married and went to live at her husband's house, and defendant paid the £40 for some years and then discontinued paying. Complainants filed their bill to compel payment of the annuity. *Held*, that Phoebe was sole judge as to the inadequacy of the maintenance and was not bound to give a reason for objecting to it, but could demand the £40 a year at any time; (2) that her marriage and removal to her husband's house were in themselves notice that she considered the maintenance inadequate, and coupled with a demand for the £40 constituted a dispute as to the adequacy of the maintenance; (3) that defendant having paid the £40 for some years was estopped from objecting to continue doing so. *BRECKEN v. WRIGHT.* (Chancery). - 287

2 — *Interlineation — Custody — Evidence — Ejectment.*] — D. G., senior, who died in 1823, devised 100 acres to his son D. G., junior, and "heirs of his body forever," the words "heirs of his body forever" being interlined. The devisee died unmarried and plaintiffs claimed as co-heirs of D. G., senior, against the trustees of J. G., junior, his residuary devisee. D. Green, junior, survived the testator over thirty years. The will was drawn by S. G., and the interlineation was in his hand-writing, and was in the same ink as the rest of the will and he was a witness to it. He survived D. G., junior, several years, and had the custody of the will from the time of making it until the testator's death, and no question was raised during his life-

time. E., another subscribing witness, swore he believed the will was now in the same state as when he signed it. It was not disputed that if the words interlined were not to operate as part of the will the plaintiffs must recover, and on their part it was contended that there was not sufficient evidence to show the interlineation to have been made before the execution of the will. The judge told the jury that if they were satisfied from the evidence that the interlineation had been made before the will was executed, to find for defendants, which they did. *Held*, discharging a rule to set aside the verdict that the evidence warranted the finding. *DOE D. GREEN v. GREEN*. [38.]

—Perpetuity—See EJECTMENT. 2.

Witness—*remaining in Court.*—*In discretion of judge to allow him to be examined.*—At the trial all

the witnesses were ordered to withdraw, but defendant remained in and was tendered as a witness, but rejected by the Court, and a verdict found for plaintiff. Defendant moved for a new trial on the ground of the improper rejection of evidence. *Held*, discharging the rule, that the rejection or admission of the witness's testimony was entirely in the discretion of the judge. *YOUNG v. YOUNG*. - 98

2.—A commission to examine a witness abroad will be refused when there is unnecessary delay in making the application. *UNION BANK v. DAWSON*. - 279

3.—A judge in Chambers has no power to order *viva voce* examination of a witness *de bene esse*. *HODGSON v. DAWSON*. - 281

Writ—Dated on Sunday. See PRACTICE.

Wrongdoer—See EJECTMENT. 2.

